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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 934

HUGH BRYSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR HUGH BRYSON

OPINIONS BELOW

The opinion of the Court below (App. 44)[1] is reported at 403 F. 2d 340; the opinion of the District Court (App. 26) is unreported.

[1] "App." refers to the Appendix printed and filed, pursuant to this Court's Rule 36; "Br. in Op." refers to the Government's Brief in Opposition to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals (App. 46) was entered on November 5, 1968. The petition for certiorari was filed on January 13, 1969 and was granted on February 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[2]

In 1955 petitioner was convicted of having violated the "False Statement" Statute, 18 U.S.C. 1001, by stating in 1951 in an affidavit, filed pursuant to Section 9(h) of the Labor Managament Relations Act of 1947 (the Taft-Hartley Act), 29 U.S.C. 159(h),[3] that he was not then "affiliated" with the Communist Party. His conviction was affirmed *(Bryson v. United States,* 238 F. 2d 657 [9 Cir., 1956]; rehearing denied, *Bryson v. United States,* 243 F. 2d 837 [9 Cir., 1957]; cert. den., 355 U.S. 817 [1957]), and he commenced the service of his sentence in January, 1958.[4] Twenty-

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[2]Petitioner first raised, by motion to dismiss, all the constitutional arguments herein presented, including specifically that the statute "on its face and as applied to him," violated Article I, Section 9, the First Amendment and the Fifth Amendment *(Bryson v. United States,* No. 171, O.T., 1957, 355 U.S. 817, Clerk's Transcript on Appeal, Motion to Dismiss, p. 3, ll. 10-11); he raised them thereafter during the trial, in post-trial motions, on appeal, in his petition for rehearing, and on certiorari (App. 26-27; Br. in Op. 2).

[3]Since repealed by Section 201(d) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, and "replaced" by Section 504 thereof (29 U.S.C. 504). See *United States v. Brown,* 381 U.S. 437, 439 (1965).

[4]District Judge William C. Mathes imposed a maximum sentence of 5 years imprisonment and "a fine of $10,000, and be further imprisoned until said fine is paid or you are otherwise discharged as provided by law." *(United States v. Bryson,* No. 34105, N.D.,

three months later he was released on parole, but he is still subject to the supervision of the Probation Officer. Petitioner has paid $2,000 of his fine. The Government has brought an action to collect the remaining balance of $8,000 (*United States v. Bryson,* N.D., California, Civil No. 47,080).

On May 24, 1967, petitioner filed a motion in the Northern District of California, seeking relief from the judgment of conviction and its attendant disqualifications, on the ground that this Court's deci-

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Calif., June 14, 1955, Proceedings Upon Sentence and Fixing of Bail on Appeal, pp. 16-17.) The case had been submitted to the jury on a two-count indictment; the jury acquitted petitioner on the count charging him with false swearing as to membership in the Communist Party, and convicted for false swearing as to affiliation with that Party. A third count, charging petitioner with falsely denying "support" of an organization advocating doctrines proscribed by the statute, was dismissed by the Government prior to trial.

Neither in the dismissed count, nor in the counts on which petitioner was tried, was there any allegation that petitioner himself believed in the overthrow of the Government by force or illegal means, or that his oath in that regard was in any way false; and no evidence was offered to show that his beliefs, or his associations with members of the Communist Party or the Party itself, involved activities or discussions relating to forbidden doctrine or illegal conduct. Neither was evidence offered concerning the teachings of the Communist Party with respect to the forcible overthrow of the Government, or the instigation of political strikes. Nevertheless, at the time of pronouncing sentence, the trial judge said, "The statute under which he is prosecuted is a general statute, and for punishment I look to the analogy of the Smith Act. As I view it, what he is convicted of—the substance of what he is convicted of, for the purposes of punishment is the same as if he had been convicted of a violation of the Smith Act." (*ibid.,* 16). Ironically, the Court of Appeals, although it professed to take a different view of the offense of which petitioner had been convicted *(Bryson v. United States,* 243 F. 2d 837, 839 [9 Cir., 1957]; cert. den. 355 U.S. 817 [1957]), refused to reduce or otherwise interfere with the sentence. *(Bryson v. United States,* 265 F. 2d 9 [9 Cir., 1959]; cert. den. 360 U.S. 919 [1959]). *Cf.* the dissenting opinion of The Chief Justice and Mr. Justice Douglas in *Birnbaum v. United States,* ..... U.S. ....., 37 U.S.L.Wk. 3355 (March 24, 1969).

sion in *United States v. Brown,* 381 U.S. 437 (1965), supported the conclusion that Section 9(h) was a bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution of the United States. The motion also alleged that Section 9(h) was repugnant to the First and Fifth Amendments to the Constitution. District Judge A. J. Zirpoli granted the relief prayed for[5]; however, the Court of Appeals reversed, holding that this Court's decision in *Dennis v. United States,* 384 U.S. 855 (1966) deprived petitioner of standing to challenge the constitutionality of Section 9(h).

The questions, as stated in the petition for certiorari, which was granted without any qualifications, are:

(1) Whether petitioner is precluded, by reason of this Court's decision in *Dennis v. United States,* 384 U.S. 855, from attacking the constitutionality of Section 9(h) of the Taft-Hartley Act.

(2) Whether, in the comparative light of *American Communications Assn. v. Douds,* 339 U.S. 382, and *United States v. Brown,* 381 U.S. 437, Section 9(h) is constitutional.

(3) Whether the petitioner qualifies, under either 28 U.S.C. 1651 (the All Writs Statute) or 28 U.S.C. 2255, for post-conviction relief.

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[5]Except the request that the Government be ordered to refund the $2,000 theretofore paid on the fine. This relief was denied, and petitioner does not seek such relief by his petition here.

STATUTES INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (formerly 29 U.S.C. [1958 ed.] 159(h)), which was repealed by Section 201(d) of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organ-

ization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [sections 286, 287, 1001, 1022 and 1023 of Title 18] shall be applicable in respect to such affidavits.

Section 504 of 29 U.S.C., as amended in 1959, provided in pertinent part:

(a) No person who is or has been a member of the Communist Party . . . shall serve

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party . . .

. . .

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 1651 of 28 U.S.C. provides in pertinent part:

The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 2255 of 28 U.S.C. provides:

A prisoner in custody under sentence of a Court established by Act of Congress claiming

the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the Court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

. . .

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

STATEMENT OF THE CASE

Petitioner was born in Logan County, Illinois, in 1914, the son of a tenant farmer.[6] After graduating from high school in 1932, he obtained such occasional employment as was available to young men during the depression years. In 1936 he joined the Marine Cooks and Stewards Association (later National Union of Marine Cooks and Stewards) and began going to sea regularly in the Stewards Department on West Coast merchant ships. In time he became active in affairs of the union, served on its various committees, rose through the ranks, and in 1947 became its president—a position he retained until the union's dissolution in 1954.

Thereafter he became a licensed real estate broker, a vocation he was following at the time of his trial, which he resumed upon his release from prison, and which he now follows to support his wife and five minor children.[7]

It appears that, at the beginning of 1938, petitioner attended some Communist meetings on shipboard where the general subject of discussion had to do with working for a better union and improving conditions of the men on the vessels. Such contacts as he had with the Communist Party ended no later than the early part of 1947.

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[6]The following narrative biography of petitioner is summarized from the Transcripts of Record in *Bryson v. United States*, No. 171, O.T. 1957, 355 U.S. 817, and in *Bryson v. United States*, No. 929, O.T. 1958, 360 U.S. 919.

[7]California requires a licensee to establish his "honesty, truthfulness, and good reputation." (Business and Professions Code, §§ 10151, 10152.)

By 1951 the union was involved in a jurisdictional dispute and in self-protection had to invoke the facilities of the National Labor Relations Board. Before signing the 9(h) affidavit, petitioner "discussed its effect fully and completely with my attorneys. I told them I had ceased associating in any way with Communists in early 1947, and that four years later I felt was ample time to have disassociated" *(Bryson v. United States,* No. 929, O.T. 1958, Transcript of Record, p. 14). He was advised that, under those circumstances, "there would be no difficulty" if he signed the affidavit[8] and he did so. Now, nearly 20 years later, he is still seeking to vindicate himself.[9]

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[8]The fact that petitioner received and relied on legal advice could not be proved at petitioner's trial, for the rule of the Ninth Circuit excluded evidence that a defendant in a criminal trial had acted on the advice of counsel *(In re Merritt,* 28 F. 2d 679, 680 [9 Cir., [1928]; see also *Sinclair v. United States,* 279 U.S. 263, 299 [1929]). The rule of *In re Merritt* and *Sinclair, supra,* has been reaffirmed in the Ninth Circuit since the date of petitioner's trial *(Bisnov v. United States,* 299 F. 2d 711, 719-720 [9 Cir., 1961]). This Court has also reaffirmed the rule of *Sinclair (Braden v. United States,* 365 U.S. 431 [1961]).

It was the prosecution's theory, which the trial court accepted, that the only relevant issue of intent was whether petitioner intended to file the affidavit, not the intent with which it was filed *(Bryson v. United States, supra,* n. 2, Reporter's Transcript on Appeal, pp. 1090, 1138L), hence evidence of reliance on legal advice, as bearing on the issue of specific intent, would be irrelevant. Such evidence is not, however, irrelevant in these collateral proceedings.

[9]The Court of Appeals had occasion to pass upon petitioner's character at the time of an application for bail on appeal. It found from the record that:

> "It appears that Bryson has no prior record of convictions of any offenses, felony or misdemeanor. For many years of his life he was an American merchant seaman, subject to the jurisdiction of the United States Coast Guard; at no time was he ever charged or convicted of any violation of the rules or regulations of the United States Coast Guard. In all respects whatsoever, save and except for the conviction hereinabove

At the criminal trial, where petitioner was convicted of having falsely denied that he was "affiliated" with the Communist Party in April of 1951, the Government produced no evidence of any association with the Party at any date later than 1947. His appeal from the conviction, and a later effort to obtain a reduction of the sentence, were unavailing (see *supra*, n. 4). Petitioner served nearly two years in Federal prison (before he was released on parole) and paid $2,000 of the $10,000 fine, being unable to pay the balance. He continues to be under parole supervision, and remains subject to the provision in his sentence, that he "be further imprisoned until said fine is paid or you are otherwise discharged as provided by law."

After the decision in *United States v. Brown*, 381 U.S. 437 (1965), the present action was instituted by petitioner when he filed, in the District Court, a "Motion for Writ of Error *Coram Nobis* to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for Other Requested Relief" (*Bryson v. United States*, N.D., California, Civil No. 47,127). He alleged that the District Court had jurisdiction under 28 U.S.C. 1651 (the "All Writs Statute") as well as under 28 U.S.C.

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mentioned, Bryson's record of conduct has been and is without blemish.

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Coupled with this there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person, such elements in his character being required to be considered by the last phrase of 46(c), 'the character of the defendant.'" (*Bryson v. United States*, 223 F. 2d 775, 777 [9 Cir., 1955]).

2255. Petitioner asserted that his sentence violated the Constitution of the United States (and therefore that the Court was without jurisdiction to impose it) because his conviction rested upon a statute (9[h]) which was unconstitutional as a bill of attainder and which was violative of the First and Fifth Amendments.

After a hearing on the merits, the District Court ordered that petitioner's conviction and sentence be set aside, that he be released from parole, and that he be relieved of the obligation to pay the remaining portion ($8,000) of his fine (App. 43). On the Government's appeal, the Court of Appeals reversed, holding that petitioner had no standing to attack the constitutionality of Section 9(h) (App. 45).

To facilitate understanding of the issues presented here, it is necessary to turn briefly to the history of the statute on which petitioner's conviction was based:

(1) In 1950, Section 9(h) withstood an attack that it was unconstitutional as a bill of attainder and for infringing First and Fifth Amendment rights (*American Communications Assn. v. Douds,* 339 U.S. 382 [1950]). Three members of the Court did not participate in the decision. The provision of the law relating to "affiliation" was upheld by four Justices, with Mr. Justice Black and Mr. Justice Frankfurter separately dissenting.[10]

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[10]Mr. Justice Black deemed the statute to be a bill of attainder in its entirety. In reference to "affiliation," he wrote:

"Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however

(2) In 1959, Section 9(h) was repealed; contemporaneously, Section 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C.A. 504) "was enacted to replace" it. *(United States v. Brown*, 381 U.S. 437, 439 [1965]).

(3) In June of 1965, Section 504 was held unconstitutional as a bill of attainder in an opinion written by The Chief Justice expressing the views of five members of this Court (*United States v. Brown, supra.*) The opinion suggested (381 U.S. at 447) that *Douds* had departed from the "spirit" in which the bill of attainder clause had been "consistently interpreted," and said (381 U.S. at 460) that the Court in *Douds* had "misread" an earlier bill of attainder case: *United States v. Lovett,* 328 U.S. 303 (1945). The four dissenting Justices in *Brown* wrote of that decision's impact on *Douds* and Section 9(h) in these words:

> "It is not difficult to find some of the cases and statutes which the necessary implications of the Court's approach will overrule or invalidate.
>
> *American Communications Assn. v. Douds,* 339 U.S. 382, which upheld the predecessor statute

much we abhor the ideas which they advocate." *(Douds, supra,* 452.)

Mr. Justice Frankfurter, taking note of "the dubious scope of the term 'affiliated' in the statute" (*Douds, supra,* 420, n. 2), wrote as follows:

> "If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of §9(h) to be restricted to disavowal of actual membership in the Communist Party, or in an organization that is in fact a controlled cover for that Party, or of active belief, as a matter of present policy, in the overthrow of the Government of the United States by force. But what Congress has written does not permit such a gloss nor deletion of what it has written." *(Douds, supra,* 421-422.)

to §504 is obviously overruled. . . . Like §504, the statute there under consideration did not cover all persons who might be likely to call political strikes. . . . The Bill of Attainder Clause now forbids Congress to do precisely what was validated in *Douds*". *(United States v. Brown, supra,* at 464-465.)

(4) In November 1965, this Court granted certiorari to review a decision of the Court of Appeals for the Tenth Circuit, which had affirmed a criminal conviction involving section 9(h). The writ limited review to three questions, one of which read:

"Whether, in the comparative light of *American Communications Ass'n. v. Douds,* 339 U.S. 382, and *United States v. Archie Brown,* 381 U.S. 437, Section 9(h) of the Taft-Hartley Act is constitutional." (*Dennis v. United States,* 382 U.S. 915 [1965].)

(5) In June of 1966, this Court reversed the criminal conviction in *Dennis,* but laid decision on the trial Court's denial of a motion to make certain grand jury testimony available for pretrial examination *(Dennis v. United States,* 384 U.S. 855 [1966]). This Court expressly declined to entertain the constitutional attack on Section 9(h) for the reason that the *Dennis* petitioners were held to lack standing to assert the challenge *(Dennis, supra,* 865-867). While joining in the reversal, Justices Black and Douglas dissented from the Court's refusal to pass on the constitutionality of Section 9(h) *(Dennis, supra,* 875-881).

(6) On January 13, 1969, the petition for certiorari herein was filed and on February 24, 1969,

it was granted, without qualification, so that the constitutional issue which the Court declined to consider in *Dennis*—i.e., the validity of Section 9(h) in the light of Article I, Section 9, Clause 3 and of the First and Fifth Amendments (see *Dennis v. United States*, No. 502, O.T. 1965, Brief for Petitioner, 20-35)—is now here for decision.

SUMMARY OF ARGUMENT

I

Section 9(h) of the Labor Management Relations Act of 1947 Is Unconstitutional As a Bill of Attainder and As Violative of the First and Fifth Amendments.

A. A bill of attainder is a legislative act which inflicts punishment without a judicial trial *(Cummings v. Missouri,* 4 Wall. 323 [1867]). A statute which requires, as 9(h) does, a test oath as a condition of unrestrictedly pursuing a lawful calling is a bill of attainder *(Cummings v. Missouri, supra; Ex parte Garland,* 4 Wall. 333 [1867]).

Section 504 of the Labor Management Reporting and Disclosure Act of 1959, enacted to "replace" 9(h), was held unconstitutional as a bill of attainder in *United States v. Brown,* 381 U.S. 437 (1965). We show that Section 9(h) presents no distinct or different problems from Section 504. The *Brown* case specifically states that *American Communications Assn. v. Douds,* 339 U.S. 382 (1950), which is relied upon to sustain the validity of 9(h), departed from the "spirit" in which the bill of attainder clause had been

"consistently interpreted" and that *Douds* had "misread" this Court's earlier bill of attainder decisions. The dissenters in *Brown* were clear that the decision overruled *Douds* and necessarily invalidated 9(h).

Accordingly, petitioner's conviction and sentence were illegal.

B. *Douds* itself recognized that 9(h) effected an invasion of First Amendment rights, but sought to "balance" that invasion against the Government's claimed interest in preventing political strikes. The command of the First Amendment does not permit of such a balancing. In any event, *Aptheker v. Secretary of State,* 378 U.S. 500 (1964) establishes that the exercise of First Amendment rights is not subject to even non-criminal sanctions on the basis of mere membership in (much less being "affiliated" with) the Communist Party. There was no proof here that petitioner's "affiliation" involved any unlawful knowledge, intent, beliefs, or activity. His conviction therefore cannot stand under the First Amendment.

Furthermore, the sweeping character of 9(h) *(Shelton v. Tucker,* 364 U.S. 479 [1960]), the vagueness of the term "affiliation", and the Section's obviously chilling effect upon the exercise of First Amendment rights *(Dombrowski v. Pfister,* 380 U.S. 479, 487 [1965]) make it unconstitutional under the Fifth Amendment, on its face and as applied to petitioner.

II

Under the Applicable Post-Conviction Statutes, Petitioner Was Entitled to Be Relieved of the Remaining Disabilities of His Conviction.

A. 28 U.S.C. 2255 authorizes a federal parolee to maintain an action for relief from a sentence imposed in violation of the Constitution *(Carafas v. LaValle,* 391 U.S. 234 [1968]; *cf., Jones v. Cunningham,* 371 U.S. 236 [1963]; *United States v. Hayman,* 342 U.S. 205 [1952]).

B. Alternatively, the All Writs Statute, 28 U.S.C. 1651, authorizes petitioner to maintain, on the same grounds, an action for relief by way of a writ of error coram nobis *(United States v. Morgan,* 346 U.S. 502 [1954]; *Holloway v. United States,* 393 F.2d 731 [9 Cir., 1968]; *cf., Harris v. Nelson,* ..... U.S. ....., 37 U.S.L.Wk. 4219 [March 24, 1969]).

C. Nothing in *Dennis v. United States,* 384 U.S. 855 (1966) deprives petitioner of the rights granted to him by the foregoing sections of Title 28 of the United States Code. *Dennis* denied standing to persons who knowingly conspired to deceive the Government into believing that they had resigned from the Communist Party when in fact they had not. The "conspiracy, cynical and fraudulent," was at the heart of the holding *(Dennis, supra,* 865). Here the petitioner's good faith belief, supported by the advice of counsel, that he was not "affiliated" with the Party after four years of actual disassociation, presents an entirely different record against which the non-rigid concept of standing is to be measured.

Furthermore, unlike *Dennis,* this case presents the issue in the context of a post-conviction attack. *(Cf., Kaufman v. United States,* ..... U.S. ....., 37 U.S.L. Wk. 4238 [March 24, 1969]). To hold that petitioner may not utilize the post-conviction statutes is judicially to repeal them, at least as to some types of crimes.

ARGUMENT

INTRODUCTORY

This case comes here in the appearance of a proceeding to set aside petitioner's conviction for falsely swearing that he was not affiliated with the Communist Party. But its appearance covers over many troubling facets of recent American life. These facets have place here because the 1955 case against petitioner was born of the emergence, some two decades ago, of a legislative policy that is essentially alien to our democratic tradition. Expressing itself in enactments of unprecedented nature, this policy has exerted wide-ranging power over the destiny of untold numbers of the American people. In the process, it has raised questions that reach deeply into the heart of our system of justice, and has posed crucial issues of constitutional law. The statute whose impact fell on petitioner was an intrinsic part of that policy. Hence, to do justice here, the enveloping circumstances must be taken into account. The case against petitioner, its 15-year history in the courts, and the

somber background of governmental actions which encompass that period, must be viewed together and in context.

The 1947 law (Section 9[h]) of which this Court said three years later that by it "Congress has undeniably discouraged the lawful exercise of political freedoms," and that it had the "necessary effect of discouraging the exercise of political rights protected by the First Amendment" (*American Communications Assn. v. Douds,* 339 U.S. 382, 393) should have been voided then. It was said, in its justification, that Congress had received evidence that Communists "subordinate[d] legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of policies of a foreign government." (*ibid,* 388-389); and that from "a great mass of material before it which tended to show that Communists and others . . . had infiltrated union organizations . . . to make them a device" to disrupt commerce for political reasons (*ibid,* 389), Congress could "rationally find" that Party members would be "likely to resort" to political strikes (*ibid,* 391), and "might reasonably find" that Communists "represent a continuing danger of disruptive political strikes when they hold positions of union leadership" (*ibid,* 393). But even at the moment of decision, it was acknowledged that the "material" on which Congress had relied consisted of "conflicting evidence" (*ibid,* 400); and in the separate opinion of Mr. Justice Jackson (concurring and dissenting), it was said of the same "material" that,

> "Most of this information would be of doubtful admissibility or credibility in a judicial proceeding" (*ibid,* 424, n. 2).

Nevertheless, in deference to the supposed legislative "findings," this Court upheld the law, declining to "assess the validity" of the evidence (*ibid,* 400).

But "facts do not assess themselves . . . [T]he decisive element is the attitude appropriate for judgment." (*Baumgartner v. United States,* 322 U.S. 665, 666-667 [1944]). To suppose that the several Congressional committees before whom was placed this mass of conflicting and contradictory materials, approached the task of "assess[ing] [its] validity" with an "attitude appropriate for judgment," is to belie the simplest facts of life. Whatever legislative assessment occurred, it could scarcely have escaped the dominating influence of the political passions (and doubtless, in some instances, the private ambitions) that engendered the new Congressional policy.[11] It cannot be denied that history affords sobering examples of the extremes to which men in public office are sometimes

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[11]The political climate existing in 1947 calls to mind the observation of Mr. Justice Story that bills of attainder were usually adopted in periods of "great political excitements" (*infra,* 33, n. 21). A distinguished legal scholar, reviewing a period of similar "excitements" that gave rise to the Smith Act of 1940 (18 USC 2385), reports as follows:

> "Once Congress had lashed itself into such anger against supposedly subversive aliens, it is small wonder that it made a clean job by throwing citizens into the statute too. Representative T. F. Ford of California remarked during the debates:
>
> 'The mood of the House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it.' " (Chafee, Free Speech In The United States [1941], 446).

propelled under the whip of inflammatory circumstances.[12] Was it not rightly said (in a different setting, but with regard to an important issue of constitutional law) that "there comes a point where this Court should not be ignorant as judges of what we know as men"? (*Watts v. Indiana,* 338 U.S. 49, 52 [1949]).

In all truth, the "findings" which were held in *Douds* to justify an impairment of First Amendment rights were but expressions of ultimate judgments. Properly to reach these, a careful "assessment of the trustworthiness of witnesses" was indispensable (*Baumgartner v. United States,* 322 U.S. 665, 670 [1944]). For "[t]he conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based" (*ibid,* 671). Some one, therefore, ought to have examined with a critical eye the contributions made to the ultimate "findings" by any ex-Communist who, as a witness, may have "found rewards far more tempting than truth" *(infra,* 37, n. 26).[13] We have learned from subsequent experience

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[12]E.g., the use of the Sedition Act against the party of Thomas Jefferson (see Smith, Freedom's Fetters [1956]); the outburst against aliens following World War I (see Post, The Deportations Delirium Of Nineteen-Twenty [1923]); and the expulsion from the New York Legislature of five members who had been duly elected on the Socialist Party ticket (see Chafee, Free Speech In The United States [1941]).

[13]The particular episode that was said, in *Douds,* to have been relied on by Congress, was a strike at the Milwaukee plant of the Allis-Chalmers Manufacturing Company in 1941 (*American Communications Assn. v. Douds,* 339 U.S. 382, 388 [1950]). "Congress heard testimony that the strike had been called solely in obedience to Party orders for the purpose of starting the 'snowballing of strikes' in defense plants" (*ibid*). This testimony (*ibid,* n. 4) came from Louis Budenz, a former employee of The Daily Worker, the

how "trustworthy" were some of the witnesses on whom reliance was placed, first to inform the legislative mind as preface and prelude to enacting legislation, and later to assist prosecutors, courts, juries and administrative agencies to dispense justice. Of the evidence given at trials by their kind, this Court has been moved to say,

> "The dignity of the United States Government will not permit the conviction of any person on tainted evidence. . . . The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." (*Mesarosh v. United States,* 352 U.S. 1, 9, 14 [1956]).

See also, *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 [1956]).

Communist Party's New York newspaper. A reading of the testimony discloses that it is essentially hearsay in character, and not susceptible of verification or corroboration. The same strategem was employed in the testimony given by Budenz when he lent himself to the effort of Senator Joseph McCarthy of Wisconsin to destroy the reputation of Professor Owen Lattimore, at hearings before a Sub-Committee of the Senate Foreign Relations Committee in April 1950 (see Lattimore, Ordeal By Slander [1950]). For this and other instances where Budenz played the role "of America's No. 1 professional witness in all matters concerning loyalty, patriotism, and political reliability", he was denounced on the Senate floor by Senator Dennis Chavez of New Mexico, who compared Budenz with Titus Oates (96 Cong. Rec. 6969-6975 [May 12, 1950]).

It appears that Budenz was the only witness purporting to give such testimony concerning the Allis-Chalmers strike. None of the union leaders involved in the strike supported that testimony. Neither does it appear that any undercover operative or agent of the Federal Bureau of Investigation, working within the union or the local Communist Party group, supplied any information of a similar nature. On the other hand, there was strong evidence that the company had "a long and sordid record of anti-labor activities," that the strike was called to correct pressing economic grievances, and that the Company refused the union's offer to mediate or arbitrate the issues (93 Cong. Rec. A256-257 [January 23, 1947]; remarks of Representative Price).

There is a further, and in itself sufficient, reason to be skeptical of the legislative "findings" that were held to justify the decision in *Douds.*[14] Though they purport to deal with problems of a purely economic nature, the pivotal issue (insofar as 9[h] is concerned) relates to political beliefs and associations, clearly subjects embraced within the protection of the First Amendment. Whenever this Court has acquiesced in the view that it should not oppose its judgment to that which Congress has expressed in findings of its own, this has occurred in cases where Congress may be said to possess a greater competence to deal with the subject at issue, or to have more complete information in matters of a technical nature with which the legislation dealt, or to have had the benefit of authoritative testimony from those who possess special expertise to commend them (see e.g., *Sinclair Ref. Co. v. Atkinson,* 370 U.S. 195 [1962]; *Railway Employes' Dept. A.F.L. v. Hanson,* 351 U.S. 225 [1956]; *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 [1937]). The very recital of these instances where it is appropriate to apply the rule of deference, should have compelled a different conclusion here. For not Congress, but this Court, is the expert in assessing the value of evidence which relates to First Amendment freedoms. When "prophylactic" measures fashioned by Congress intrude into areas protected by the Bill of Rights, they are "suspect" (*N.A.A.C.P. v. Button,* 371 U.S. 415, 438 [1963]). And since this Court is not an instrument of Con-

[14]These "findings" did not, however, persuade President Truman, who vetoed the 1947 Taft-Hartley Bill, of which 9(h) was a part (Truman, Memoirs [1956], Vol. II, 479).

gressional policy, but the expositor of the Constitution, the so-called "findings" should have been ignored. This carries no implication that Congress' motives are thereby impugned; it means only that the integrity of the judicial process will not be staked on questionable assumptions concerning the legislative capacity to exercise considered judgment in the sphere of political freedom during periods of great political tensions.[15]

It was inevitable from the outset that the mere passage of time must demonstrate how fragile were the foundations on which 9(h) rested. Since it bore no truly rational relationship to the known and easily ascertainable facts, it was bound to expose itself as a contrivance. Throughout the whole of its existence, 9(h) was ineffective to achieve its purpose—so the Government has since told this Court (*United States v. Brown,* No. 399, O.T. 1964, Government Brief, 30-37). The statute (504) that replaced 9(h) when

[15]Consider, for instance, the unrestrained intemperance of the "findings" recited in the Communist Control Act of 1954 (50 USC 844-847). Today, when President Nixon has informed the Nation that the internal security of our people may well depend on achieving an agreement which he seeks to negotiate with the USSR, so that nuclear weapons may come under the joint control of both countries, we are still enforcing laws premised on two assumptions: (1) that there is a single foreign center, to-wit, Moscow, of one monolithic world-wide Communist movement that seeks to destroy us; and (2) that the justification for all of our legislation against American Communists is that they act as the agents of Moscow. The fact, however, is that there are no fewer than four such "centers": the Soviet Union, Tito's Yugoslavia, Mao's China, and Castro's Cuba, all of them in apparent spirited competition with each other, and at least two of them currently engaged in reportedly large-scale warfare on the Siberian front. It is probably true that each of these foreign movements has some admirers in this country. It is not easy to reconcile either the international situation or the domestic picture with the fictitious "findings" and the equally fictitious theory of "agency" that are contained in the 1954 Act.

the latter was repealed in 1959, was employed exactly once in the six years that elapsed before it was declared unconstitutional (*United States v. Brown,* 381 U.S. 437 [1965]). Thus, over a span of two full decades, we had for a time an ineffective law, and for the remainder a virtually unused one—to all intents and purposes, no law at all to deter the political strikes with which the country was supposedly menaced. It is strange that no political strikes have occurred anywhere in the United States during all of those years, despite the absence of effective protection against them.

But if there has been no harm inflicted on the Government by the allegedly disloyal Americans against whom so much special legislation has been directed,[16] it cannot be said that the national policy has been sparing in its treatment of the people on whom the oppressive burdens of that legislation have fallen. Under the aegis of a variety of Congressional anti-Communist enactments,[17] which in turn stimulated like measures to be taken by the states and local governments, we have managed to assemble an impressive array of decisions establishing the lengths to which

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[16]It is instructive to note that in the cases that have come before this Court, involving anti-Communist legislation, committee hearings, and the like, it does not appear that anyone who was criminally convicted, or discharged from employment, or excluded from a profession or vocation, or held in contempt, was ever shown to have committed a single act of internal disturbance or violence against the Government, or planned or attempted to do so, or to have incited any other person toward such a goal.

[17]For example, Internal Security Act of 1950, 64 Stat. 987 (1950), 50 USC §§781-794, 811-826; Communist Control Act of 1954, 68 Stat. 775 (1954), 50 USC §§841-844.

the policy of repression has impelled us. We have, for example, sanctioned the imprisonment of men for no other offense than that they possessed the courage to stand up to inquisitorial committees, placing their resistance to improper inquiries concerning their political associations on the Constitutional guarantees which occupy a "preferred position" in our scheme of government. (*Wilkinson v. United States,* 365 U.S. 390 [1961]; *Barenblatt v. United States,* 360 U.S. 109 [1959]). We have approved the exclusion from the practice of law of men whose endowments would have enriched the legal profession, holding against them the fact that they were staunch defenders of the principles of personal freedom that are "enshrined in the First Amendment of the Bill of Rights" (*In re Anastaplo,* 366 U.S. 82 [1961]; *Konigsberg v. State Bar of California,* 366 U.S. 36 [1961]).[18] We have permitted an eminently qualified physician to be suspended from medical practice because he was convicted of contempt of a Congressional committee, resulting from his refusal, on legal advice, to answer questions of a political nature, for which he had already paid the price of serving a term in prison (*Barsky v. Board of Regents,* 341 U.S. 442 [1954]). We have countenanced the jailing of an aged man for opposing the demand of a State Attorney General that he become an informer, by supplying the names of "subversive" friends and associates, against whom the State proposed to take punitive action because

[18]These decisions may soon be reviewed as a result of this Court's grant of certiorari in *Baird v. Arizona State Bar,* No. 1079, OT, 1968, ... U.S. ....., 37 U.S.L.Wk. 3377, 3379 (April 7, 1969).

they had peacefully assembled to discuss public affairs (*Uphaus v. Wyman,* 364 U.S. 388 [1960]). We have appropriated, in effect, the pitiful funds that a lawfully resident alien paid towards his old-age pension, by arranging first to deport him for an ancient, long-terminated, and probably innocuous membership in the Communist Party, and then declining to send payments to him in the country to which he was banished (*Flemming v. Nestor,* 363 U.S. 603 [1960]).[19] This sorry catalogue has moved some members of the Court to remark upon "the disastrous consequences upon [the liberties guaranteed by the Bill of Rights] which have resulted from the Court's use of [balancing] concepts" (*Uphaus v. Wyman,* 364 U.S. 388, dissenting opinion 389, 392-393 [1960]).

It was the intention of the Framers to create a structure capable of resisting the ravages of time. In the Constitution that they bequeathed, there was traced out for future generations a system of checks upon the exercise of power, and a balance between the departments of government exercising power, prefigured to insure the vitality of the Charter's guarantees. Preeminent among those guarantees was the

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[19]Cf., however, *Reed v. Gardner,* 261 F. Supp. 87 (C.D. Calif. [3-judge court], 1966) which held unconstitutional, as violative of the First Amendment, Section 103(b)(1) of the Health Insurance for the Aged Act, 79 Stat. 333 (1965), denying medicare benefits to applicants who are members of organizations required to register under the Internal Security Act of 1950. The Government decided not to take an appeal, in view of this Court's decision in *Elfbrandt v. Russell,* 384 U.S. 11 (1966) (*Communist Party of the United States v. United States,* 384 F. 2d 957, 959 n. 3 [D.C. Cir. 1967]). Compare *Weiss v. Gardner,* 263 F. Supp. 184 (S.D.N.Y. [3-judge court] 1966), judgment vacated with instructions to dismiss as moot, *Weiss v. Gardner,* 386 U.S. 9 (1967) and *Frankel v. Gardner,* 263 F. Supp. 218 (E.D. Pa., 1966).

commitment undertaken in the First Amendment, by which the interests of government are subordinated to the paramount purpose for which government was ordained, a way of life that supremely stresses the inviolable dignity and worth of the individual. So that this precept should not be easily tampered with, it was woven into the very fabric of our national existence in words of unqualified commandment. It was out of a recognition that such was the grand design, that there was handed down the great decisions of this Court in the era following the First World War. Why else did this Court order Angelo Herndon, an acknowledged Communist Party organizer, to be set free if it was not because the record lacked proof that he had personally advocated the unlawful aims of the Party or that he approved them or that he brought them home to his listeners (*Herndon v. Lowry,* 301 U.S. 242, 260 [1937])? Why did this Court reverse the criminal conviction of Dirk DeJonge if it was not that, despite his conscious participation in a meeting held under Communist Party auspices, the evidence showed no act of misconduct on his part (*DeJonge v. Oregon,* 299 U.S. 353 [1937])? Why did this Court condemn the attempt to revoke the citizenship that William Schneiderman had obtained by naturalization, if it was not because there was lack of proof that he himself had espoused forbidden doctrine or engaged in forbidden activity (*Schneiderman v. United States,* 320 U.S. 118 [1943])? Why was the deportation of Harry Bridges stayed if it was not because his admitted associations with members of the Communist Party were not

shown to indicate any intention on his part to further the supposedly prohibited policies or programs of the Communist Party (*Bridges v. Wixon,* 326 U.S. 135 [1945])? And why, at the very beginning of this series of landmark decisions, did this Court nullify a prison sentence pronounced upon Yetta Stromberg, if it was not that her open adherence to the red-flag symbol of communism was unlinked to any intention or effort on her part to engage in acts of criminal syndicalism (*Stromberg v. California,* 283 U.S. 359 [1931])?[19a] In all of these decisions, the Court gave powerful expression to the principle that no unlawful purpose should be imputed to any one from the mere fact of political association. It is these decisions that are in the true spirit of the great plan outlined in the Constitution.

The petitioner here is one of the persons victimized by the legislative policy embodied in Section 9(h), the statute that was used against him. In the pages that follow, we analyze that statute and show that it was repugnant to the Constitution in several basic respects. We argue that the prosecution of petitioner was therefore an act beyond the legitimate powers of government; that his conviction, imprisonment, and fine were contrary to law; and that the sentence imposed on him, some of it already served and some of it not yet discharged, must be set aside in its entirety.

[19a]The continued vitality of *Stromberg, supra,* has been recently recognized. See *Shuttlesworth v. City of Birmingham,* ..... U.S. ....., 37 U.S.L.Wk. 4203, 4207 (concurring opinion) (March 10, 1969); *Gregory v. City of Chicago,* ..... U.S. ....., 37 U.S.L.Wk. 4213, 4216, 4218 (concurring opinions) (March 10, 1969).

I

SECTION 9(h), THE STATUTE ON WHICH PETITIONER'S CONVICTION WAS BASED, WAS AN UNCONSTITUTIONAL ENACTMENT.

The proceeding instituted by petitioner in the District Court resulted in a determination that Section 9(h) was unconstitutional as a bill of attainder, and also because it was violative of the First Amendment. The District Judge was of the view that *United States v. Brown,* 381 U.S. 437 (1965), supported his decision on the bill of attainder ground; and in support of the holding as to the First Amendment, he cited such cases as *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), *Elfbrandt v. Russell,* 348 U.S. 11 (1966), and *Aptheker v. Secretary of State,* 378 U.S. 500 (1964).

The Court of Appeals considered neither of these determinations, because it thought petitioner's motion was foreclosed altogether by the decision of this Court in *Dennis v. United States,* 384 U.S. 855 (1966).

In this portion of the argument, we first show that 9(h) is a bill of attainder, in violation of Article I, Section 9 of the Constitution. We thereafter argue that Section 9(h) is incompatible with the First and Fifth Amendments to the Constitution.[20]

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[20]In *United States v. Brown* (334 F.2d 488 [9 Cir., 1964]), the Court of Appeals had rested its decision, holding Section 504 unconstitutional, on First and Fifth Amendment grounds. In affirming the judgment, this Court placed decision on the ground that 504 was a bill of attainder, therefore that it was "unnecessary to consider First and Fifth Amendment arguments" *(United States v. Brown,* 381 U.S. 437, 440). The dissenting opinion, observing that "An overbroadness challenge could also be made under the

(A) On its face and as applied to the petitioner, the provisions of 9(h) offend the constitutional prohibition against bills of attainder (Article I, Section 9).

Article I, Section 9, Clause 3 of the Constitution provides:

> "No Bill of Attainder or ex post facto law shall be passed."

The term "bill of attainder" was defined by Mr. Justice Field in these words:

> "A bill of attainder is a legislative Act which inflicts punishment without a judicial trial." *(Cummings v. Missouri,* 4 Wall. 277, 323 [1867]).

This definition has received general assent. *(Pierce v. Carskadon,* 16 Wall. 234 [1872]; *United States v. Lovett,* 328 U.S. 303 [1946]; *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716 [1951]; *United States v. Brown,* 381 U.S. 437 [1965].)

The early use of bills of attainder in Colonial America and the pre-Constitution States was reviewed by this Court in *United States v. Brown,* 381 U.S. 437 (1965). There, the historic English antecedents and their American counterparts were examined and analyzed; the conclusion was reached that the Framers of the Constitution, from an abundance of personal knowledge and vivid experiences, were determined to

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First Amendment . . ." put the question aside because "the Court expressly disavows decision of First Amendment claims" *(United States v. Brown, supra,* 464, n. 1). In view of these express reservations in *Brown,* we assume that it is appropriate for us to urge, as being fairly encompassed within the questions certified here, that Section 9(h) is repugnant to the First and Fifth Amendments.

make it impossible for bills of attainder ever to be employed in this Nation *(ibid,* 441-442). That determination rested solidly on a union of factors relating to the occasions for resort to such bills, the means they employed, and the unconscionable punishments inflicted on their victims.

They were usually enacted in periods of "violent political excitements" (Story, Commentaries, §1344). The penalties meted out ran the gamut from death and the confiscation of property in cases of treason, down to such comparatively mild punishments, for lesser offenses, as lengthy terms of imprisonment or banishment from the realm, or banishment from pursuing gainful professions and occupations within the realm *(United States v. Brown,* 381 U.S. at 441-442). A feature unique to all such measures was that their victims were branded, i.e., "attainted." A frequent aspect of attaint was that it rendered the recipient unfit to vote or hold office, and in cases where the death penalty was imposed, visited the taint of disqualification from office-holding on the sons of the victim *(ibid.).* The causes that were assigned for such treatment were numerous and diffuse. Some bills designated their victim or victims by name, while others used a descriptive generalization that served to identify the members of a group *(United States v. Lovett,* 328 U.S. at 315-316). Often the punishment pronounced was absolute and irrevocable; but in some instances opportunity to escape was afforded, for example, if the person attainted were to come forward and per-

form a prescribed act on or before a specified date (*United States v. Brown,* 381 U.S. at 442).

As this Court indicated in *United States v. Brown* (381 U.S. at 442), "the wide variation in form, purpose and effect" of bills of attainder lends support to the conclusion that the men who unanimously adopted Article I, Section 9, did not intend that any narrow, halting or capricious approach should be taken in applying the absolute prohibition which they wrote into that Article. Rather, they distilled from their experience and knowledge a general, all-inclusive statement of principle that took into account the essential features of the attainting measures with which they were familiar, i.e., the combination of (1) a legislative action in lieu of a judicial trial, (2) which singled out named or identifiable persons, and (3) inflicted punishment on them. What Article I sought to do was to place such methods of exercising governmental powers beyond the realm of possibility in the United States. By denying to Congress any authority to substitute "trial by legislature" for trial by the courts (*United States v. Brown, supra,* at 442), an additional safeguard was erected against encroachments on the separation of powers created in the Constitution (Constitution, Article I, Section 1; Article II, Section 1; Article III, Section 1). A like provision against bills of attainder was inserted to insulate the citizen from similar attempts at unfair treatment by the States (Article I, Section 10). Thereby, it was thought to insure the exclusiveness of the judicial process for the

protection of the people against the abuses of arbitrary power.[21]

There have been few instances in our national history of any effort to enact bills of attainder. Following the Civil War, Congress adopted a law requiring attorneys, before they could appear in federal courts, to subscribe to an oath that they had not taken part in the rebellion against the Union. This would have barred from practice in those courts an ascertainable number of lawyers who could not truthfully take the oath. The law was held to be a bill of attainder (*Ex Parte Garland,* 4 Wall. 333 [1867]). A provision contained in the newly amended Constitution of Missouri required a similar oath of priests; this, too, was held to be a bill of attainder *(Cummings v. Missouri,* 4 Wall. 277 [1867]). In both decisions Mr. Justice Field, drawing on cogent historical sources, demonstrated with unanswerable logic how such legislative action "is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies also"; and that the use of test oaths is not, in fact, based on any rational relationship to fitness for the callings involved, but

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[21]"Bills of attainder are legislative acts passed for the special purpose of attainting particular individuals of treason or felony, or inflicting pains or penalties *beyond or contrary to the common law.*" (Blackstone, Tucker Ed., Vol. I, 292; emphasis supplied).
"In short, in all such cases, the Legislature exercises the highest power of sovereignty, and what may very properly be deemed an *irresponsible, despotic discretion,* being governed only by what it deems political necessity or expediency." (Story, Constitution, Vol. III, 209; emphasis supplied).

proceeds from the desire to inflict punishment (*Cummings v. Missouri, supra,* at 318-320).

In this century, an effort was made in 1943[22] to use the weapon of attainder against several employees of the federal government whose political associations were thought by Congress to be "subversive". On this occasion, Congress identified the three persons by name, and sought to compel their separation from federal service by attaching to an appropriations bill a proviso that none of the funds should be used to pay their salaries. The President, for reasons beyond

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[22] An earlier instance of a bill singling out a named individual for punishment is afforded by the case of Harry Bridges. In 1940, a measure was introduced which purported to find that Bridges was an undesirable alien whose continued presence in the country constituted a menace to the Nation, and the Attorney General was directed, "notwithstanding any other provision of law," forthwith to take Bridges into custody and deport him (H.R. 9766, 76th Cong. 3rd Sess.). The bill failed of approval in the Senate Committee because of objections submitted by then Attorney General (later Mr. Justice) Robert Jackson. Among other things, he said that it would constitute "an historical departure from an unbroken American practice and tradition" (S. Rep. No. 2031, 76th Cong., 3rd Sess.). The House thereupon sought to achieve its aim by less direct means, resorting instead to amending the deportation laws (Act of June 28, 1940, 54 Stat. 673). In support of the amendment, Congressman Hobbs (the real author of the bill, though it was introduced by Congressman Smith of Virginia; see Hearing before a Sub-Committee of the Committee on the Judiciary, U. S. Senate, 76th Cong., 3rd Sess. on H.R. 5138, p. 11) urged, "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Bridges. . . ." (86 Cong. Rec. 5897-5898). For the subsequent history of the litigation (deportation, criminal prosecution, and denaturalization), see *Bridges v. Wixon,* 326 U.S. 135 (1945), *Bridges v. United States,* 346 U.S. 209 (1953), *United States v. Bridges,* 133 F.S. 638, N.D.Calif. (1955). See also Chafee, Free Speech in the United States [1941], 446, n. 12.

his control, was obliged to sign the bill into law, but he expressed his disapproval of the action taken against the employees. They remained at their posts, without pay. Later they brought suit to collect what was owing to them. This Court, ruling in their favor, held that the action of Congress was to be judged by its purpose and effect; so judged, that action was held to be an unconstitutional bill of attainder *(United States v. Lovett,* 328 U.S. 303 [1946]).[23]

The next occasion for resort to the attainder technique occurred with the adoption in 1947 of Section 9(h) of the Taft-Hartley Act, the statute with which we are here concerned. It was passed against a background of already intensive governmental attack against beliefs, associations, and activities that were thought to present dangers to the security of the Nation. The genesis of this official attitude would seem to have been the commencement, in 1946, of what has come to be known as the Cold War (see *Konigsberg v. State Bar,* 366 U.S. 36 [1961], dissenting opinion at 78-79). In time, there was spawned a vast body of federal and state legislation, aped by measures

[23]Against the argument that only a "mere question of compensation procedure or of appropriations was involved," and that the employees could therefore get their money from other government funds despite the clear wishes of Congress to the contrary, this Court declined to close its eyes to the undeniable fact, as shown by all the background circumstances, that the Congressional purpose was to force the employees to be discharged and to bar their future employment *(United States v. Lovett, supra* at 313-314). The fact that the punishment inflicted was merely a cutting off of pay, was said to be "no less galling or effective" a stigma of disloyalty than if it had been done by an act designating the conduct as such (*ibid,* 316-317).

adopted within private industry, that were so designed that their inevitable effect must be to visit ruinous losses of liberties and livelihood upon multitudes of people, whose fate could serve only as an intimidation and a warning that in its drive to establish conformity, the government meant business (see Emerson, Political and Civil Rights in the United States, 3d Ed. [1967] Vol. 1, 68-69). It is, we think, unnecessary for us to attempt here to trace or document the development of these occurrences in the late 1940's and early 1950's; they are still fresh in the minds of all who suffered through the period that witnessed the events which led at one crucial juncture to the censure of Senator Joseph McCarthy of Wisconsin (see S. Reps. Nos. 2507, 2508, 83rd Cong., 2d Sess. [1954]).[24]

The constitutionality of Section 9(h) was unsuccessfully challenged in *American Communications Assn. v. Douds*, 339 U.S. 382 (1950).[25] Although

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[24]This Court has observed that in *Cummings v. Missouri* and *Ex Parte Garland*, "The finding of punitive intent drew heavily on the Court's first-hand acquaintance with the events and the mood of the then recent Civil War, and 'the fierce passions which that struggle aroused' " *(Flemming v. Nestor*, 363 U.S. 603, 615 [1960]). As to whether it could properly be said that the adoption in 1954 of an anti-Communist amendment to the Social Security Act (68 Stat. 1083, as amended 42 USC §402[n]) "was not enacted in a similar atmosphere," Mr. Justice Brennan, in dissent, with the concurrence of The Chief Justice and Mr. Justice Douglas, wrote, "Our judicial detachment from the realities of the national scene should not carry us so far. Our memory of the emotional climate stirred by the question of Communism in the early 1950's cannot be so short." (*Flemming v. Nestor, supra*, at 637, n. 3).

[25]The decision in that case came at a time when Congress was debating new and more drastic measures to carry out its "anti-Communist" drive—measures that a few months later were incorporated in the most comprehensive statutory scheme ever devised in this country for the control of political beliefs and activities: the Internal Security Act of 1950 (50 USC 781-794, 811-826). This

the Court recognized *United States v. Lovett, supra,* and its early forerunners, *Ex Parte Garland* and *Cummings v. Missouri,* as authoritative precedents, those cases were thought to be distinguishable because "the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct" *(Douds, supra,* 339 U.S. at 413; emphasis in original)—a distinction that was said to be "emphasized" by the fact that the statute permitted escape from its provisions by the mere renunciation of proscribed beliefs and affiliations (339 U.S. at 414). Mr. Justice Black, in dissent, noted the fact that 9(h) bore an indistinguishable resemblance to the infamous oath prescriptions employed in England in the Sixteenth and Seventeenth Centuries (339 U.S. at 446-451; see especially nn. 3-9, incl.), and stated:

> "Never before has this Court held that the Government could for any reason attaint persons for their political beliefs or affiliations. It does so today." (339 U.S. at 449).[26]

As we have already noted (*supra,* n. 25), Congress in 1950 adopted the Internal Security Act (50 U.S.C. 781 et seq.), which was directed at the Communist

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law was so extreme, and so far departed from our traditions, that despite this country's engagement in military actions in Korea, President Truman vetoed the Act. It was passed over his veto. (See Emerson, Political and Civil Rights in the United States, 3d Ed. [1967], Vol. 1, 157.)

[26]He also reminded of the teachings of history that "wherever the test oath was in vogue, spies and informers found rewards far more tempting than truth" (339 U.S. at 447).

Party through its provisions regarding "communist-action" organizations, and which also contained provisions concerning "communist-front organizations. This legislation came before the Court in *Communist Party v. Subversive Activities Control Board,* 376 U.S. 1 (1961). There, a majority of the Court rejected the claim that the Act was a bill of attainder as respects the Communist Party, saying "The Act applies to a class of activity only, not to the Communist Party as such" (367 U.S. at 88). However, as this Court has since observed, the majority opinion, in reaching that conclusion, focused particularly upon "the crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations, but designated activities," and the implication was plain "that if the Act had applied to the Communist Party by name, it would have been a bill of attainder" *(United States v. Brown,* 381 U.S. at 451).

Experience with Section 9(h) in the period between 1947 and 1954 was considered by Congress to be unsatisfactory. So far as we are aware, no political strikes occurred anywhere in the country during that time, nor have we found anything in the pertinent legislative records to suggest any reason to fear the possible occurrence of such strikes thereafter. What evidence exists indicates that the Congressional temper had simply grown short because Communists had not been driven from the labor movement with the alacrity that had been expected of Section 9(h). To

remedy the situation, Congress adopted in 1954 the Communist Control Act (68 Stat. 775), adding "communist-infiltrated organizations" (i.e. trade unions) to the organizations made subject to the Internal Security Act of 1950 (50 U.S.C. 841-844).[27]

These provisions, by which Congress sought, in part, to reinforce the punitive purpose and thrust of Section 9(h), explicitly denounced the Communist Party as a pseudo-political party whose policies are prescribed by "the foreign leaders of the world Communist movement," and dedicated to seek the overthrow of our Government by any means, "including resort to force and violence." The Party was labeled "the agent of a hostile foreign power," and was charged with being a "clear, present and continuing danger to the security of the United States" (50 U.S.C. 841). The Act declared that the Party was "not entitled to any of the rights, privileges and immunities attendant upon legal bodies," and all such rights, privileges and immunities were, for the Party, forthwith "terminated" (50 U.S.C. 842). Party members were made subject to the provisions and penalties of the Internal Security Act of 1950, as members of a "communist-action" organization (50 U.S.C. 843). These penalties included regis-

[27] "There developed considerable criticism of Section 9(h) of the Taft-Hartley Act as inadequate and ineffective to deal with the problem of Communist influence in labor unions [citations omitted]. The first Congressional response to the operation of Section 9(h) came in the provisions of the Communist Control Act of 1954 dealing with 'communist-infiltrated organizations . . .'" (Emerson, Political and Civil Rights in the United States, 3d Ed. [1967], Vol. I, 252); see also Note, 64 Yale L.J. 712, 713-714 (1955).

tration and the possibility of internment in detention camps (see 50 U.S.C. 787, 814). Fourteen rules of evidence were promulgated to advise "the jury, under instructions from the court," how to find the existence of "membership or participation" in the Party. These included such items as making a financial contribution "in any form" to the Party, acting in any capacity for it, and conferring with Party officers or members (50 U.S.C. 844).

Petitioner's trial occurred in 1955, the year following the adoption of the Communist Control Act. It would be naive to suppose that the widespread publicity that accompanied the passage of that Act, followed by repeated reminders of the prevailing and all-pervasive Communist menace, as portrayed in televised federal and state legislative committee hearings and on the front pages of newspapers, could leave the citizenry indifferent.[28] Congress had openly proclaimed, in a law

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[28] "The operation of the [legislative] committees in the area of political expression has perhaps been the single most significant force in shaping public attitudes and influencing governmental and private action toward radical and unorthodox political thought and activity during the past two decades." (Emerson, Political and Civil Rights in the United States, 3d Ed. [1967], Vol. 1, 428).

In the 12-month period prior to petitioner's trial, among the persons brought before the numerous committee hearings that occurred (usually televised and always highly publicized), followed by criminal prosecutions for contempt, were these: John T. Watkins, April of 1954 (see *Watkins v. United States*, 354 U.S. 178 [1957]); Lloyd Barenblatt, June of 1954 (see *Barenblatt v. United States*, 360 U.S. 109 [1959]); Professor Paul M. Sweezy, June of 1954 [before the State's Attorney General] (see *Sweezy v. New Hampshire*, 354 U.S. 234 [1957]); Harry Sacher, April of 1955 (see *Sacher v. United States*, 356 U.S. 576 [1958]).

Wide publicity was also given to court decisions; e.g., this Court's decision in April of 1954, upholding New York's order suspending

whose text bristled with denunciatory passages of the Party, that "Therefore, the Communist Party should be outlawed." (50 U.S.C. 841), and had then proceeded to do so, stripping the Party of "all rights, privileges and immunities" (50 U.S.C. 842). Then, turning its attention to the task of selecting the persons on whom the official stigma was to be focused, Congress had laid down, in words that carried a mandate—("the jury, under instructions from the court, shall consider evidence"; 50 U.S.C. 844)—a detailed description of the kinds of "evidence" that were to be accepted as proof of "membership or participation in the Communist Party" *(ibid).*

An accused who faced trial in 1955 on an indictment such as is here involved might well conclude that, however innocent he might be of the charge, it was utterly impossible to overcome, in a climate of such bitter

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Dr. Edward K. Barsky from the practice of medicine on account of a committee-contempt conviction *(Barsky v. Board of Regents,* 347 U.S. 442 [1954]); the decision in September of 1954, of the Illinois Supreme Court, declining to license George Anastoplo to practice law for his refusal to answer questions concerning possible Communist Party membership *(In re Anastoplo,* 3 Ill. 2d 471 [1954]; see, also, *Re Anastoplo,* 366 U.S. 82 [1961]); the decision in April of 1955 of the California Supreme Court [without opinion], refusing to review a determination of the Board of Governors, denying to Raphael Konigsberg admission to the Bar of California on grounds similar to Anastoplo's case (see *Konigsberg v. State Bar,* 353 U.S. 252 [1957]; *Konigsberg v. State Bar,* 52 Cal. 2d 769 [1959]; and *Konigsberg v. State Bar,* 366 U.S. 36 [1961]).

In September of 1954, Congress enacted a bill to compel witnesses to answer questions, in order to circumvent the Fifth Amendment's provision concerning self-incrimination (Immunity Act of 1954; 18 U.S.C. §3486; upheld in *Ullmann v. United States,* 350 U.S. 422 [1956]). Congressional elections occurred in November of 1954; "[T]he Republicans made Communists-in-government the great issue of the 1954 elections." (Goodman, The Committee, 364 [1968]).

hostility to the very word "communist," the combined force of: (1) a law that assumed his guilt (i.e., prejudged his supposed readiness to instigate crippling political strikes and excluded as irrelevant his personal intent to the contrary), (2) the impact of testimony given by prosecution witnesses whose favored political status undoubtedly supplied subtle assurances that they might safely take liberties with the truth, and (3) the psychological conditioning to which the jurors had been subjected, creating a frame of mind conducive to convict the accused out of a sense of performance of patriotic duty, indeed perhaps in some instances to be almost fearful of doing otherwise. When, to these factors, there was added the knowledge that the trial judge could, if so inclined, compel the defendant, on pain of adjudication of contempt of court, to become an informer against other persons with whom he had associated in years long since past, the accused might well find himself helpless even to take the witness stand in his own defense, for fear of undermining all possbility of acquittal as well as earning an additional sentence of imprisonment for incurring the judicial wrath.

On the morning for which the petitioner's trial was scheduled, his case was unexpectedly assigned to a visiting judge who normally sat in Los Angeles. The disposition of this judge toward refusal by a defendant, who had voluntarily chosen to testify at her Smith Act trial, to answer questions that served no purpose except to identify other persons as Communists, was a matter of record (see *Yates v. United States,* 355 U.S. 66 [1957], granting certiorari from *Yates v. United*

States, 227 F.2d 851 [1955]).[29] Petitioner did not testify.[30]

One might suppose that the dissatisfaction of Congress with 9(h) would have been removed by the operative effect of the Communist Control Act, which has

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[29]At the trial of Mrs. Yates, which took place in 1952, she declined "to answer four questions about the Communist membership of a non-defendant and of a co-defendant who had rested his case" *(Yates v. United States,* 355 U.S. at 68). District Judge William C. Mathes "adjudged her guilty of civil contempt for refusing to answer these questions, and committed her to jail until she should purge herself by answering the questions or until further order of the Court. She was confined for the remainder of the trial" (355 U.S. at 68-69). She served "a total of over 70 days in jail awaiting final disposition of the several proceedings against her" (355 U.S. at 75). These events had occurred prior to the 1955 trial of petitioner here, and appeals by Mrs. Yates from the orders of Judge Mathes were still undisposed of, three years later, when petitioner's trial commenced. (Subsequently, the Court of Appeals affirmed the action of Judge Mathes, *Yates v. United States,* 227 F.2d 851 [1955], and this Court affirmed in part, remanding the case for resentencing *(Yates v. United States,* 355 U.S. 66 [1957]). In a dissenting opinion, Mr. Justice Douglas, with the concurrence of The Chief Justice and Mr. Justice Black, called the case "a shocking instance of the abuse of judicial authority. It is without precedent in the books." (355 U.S. at 76.)

Other but related instances of the disposition of the same District Judge toward persons accused of charges involving communism, were also matters of record prior to petitioner's trial in 1955. See *United States v. Schneiderman,* 102 F.S. 52 (1951); *Stack v. Boyle,* 192 F.2d 56 (1951); *Stack v. United States,* 193 F.2d 875 (1951); *Spector v. United States,* 193 F.2d 1002 (1952); *Stack v. Boyle,* 342 U.S. 1 (1951).

[30]It was thought sufficient in *Douds* to say that men need have no fear of suffering from miscarriages of justice "while this Court sits" *(American Communications Assn. v. Douds,* 339 U.S. at 410). Petitioner's applications to be heard by this Court were denied (355 U.S. 817; 360 U.S. 919). Two years after Bryson's trial, this Court reversed a conviction for contempt by a witness who refused to identify former associates by their political activities *(Watkins v. United States,* 354 U.S. 178 [1957]). That decision dealt with a person who was compelled under subpoena to testify in a legislative committee hearing; a different rule has generally been applied to a defendant who voluntarily takes the witness stand in a criminal trial *(Yates v. United States,* 355 U.S. 66, 73 [1957]).

been called "the most far-reaching" of the numerous security measures enacted in 1954 (Emerson, Political and Civil Rights in the United States, Vol. I, 3d Ed. [1967], 197). Certainly, the Act provided the climate necessary to convict such persons as the petitioner in Section 9(h) prosecutions. But even these results did not appease the Congressional demand. With additional experience under Section 9(h), additional discontent must have been voiced in the legislative corridors, for in 1959 that section was repealed altogether. In its place was substituted a more "direct" attack on the problem, in the form of Section 504 of the Labor-Management Relations Act (29 U.S.C. 504) (see *United States v. Brown,* 381 U.S. 437, 452 [1965]). By that law, it was made a crime for any person simultaneously to hold office in a labor union and to be a member of the Communist Party.[31]

This Court passed on the validity of Section 504 in *United States v. Brown,* 381 U.S. 437 (1965). It there held that the section was invalid for the reason that it constituted a bill of attainder, plain and simple. It pierced the veil with which Congress had sought to masquerade recourse to a bill of attainder, and exposed the way by which Section 504, instead of establishing "an objective standard of conduct" *(Brown, supra,* at 454), incorporated "an empirical judgment of, and inflict[ed] its deprivation upon, a particular group of men" (*ibid,* 455). Saying that this Court "took no position on whether or not members of the

[31]The statute applied only to membership in the Communist Party. In this respect, it differs from Section 9(h), which applied also to persons "affiliated" with the Party.

Communist Party are in fact likely to incite political strikes" (at 450, n. 24), the opinion reminded that "the Constitution forbids Congress from making such determinations" *(ibid),* reminded also that Congress possesses ample power to accomplish desired results "by rules of general applicability"; but held that it "cannot specify the people upon whom the sanction it prescribes is to be levied" (at 461).

> "Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals" *(ibid).*

Four dissenting Justices expressed the view that *American Communications Assn. v. Douds,* 339 U.S. 382 (1950), should have been followed. They observed that, by reason of the opinion of the majority, *Douds* "is obviously overruled" (381 U.S. at 464-465). Saying, "It is not difficult to find some of the cases and statutes which the necessary implications of the Court's approach will overrule or invalidate," the minority view suggested that any constitutional basis for Section 9(h) had now been removed: "The Bill of Attainder Clause now forbids Congress to do precisely what was validated in *Douds" (ibid,* 465).

Following the decision in *United States v. Brown, supra,* as our earlier discussion has pointed out, petitioner instituted the present proceeding, challenging his conviction and sentence on the ground of 9(h)'s unconstitutionality. For its part, the Government commenced an action to enforce collection from petitioner of the $8,000 balance of the fine which remains unpaid.

We think Section 9(h) cannot be distinguished in any significant way from Section 504, and as we read the Government's brief to this Court in *United States v. Brown, supra,* neither does the Government. In that brief, it was argued that "insofar as Section 504 singles out Communist Party members and bars them from positions of power in labor unions it is a permissible regulation of interstate commerce. This conclusion is supported by the constitutional principles articulated in *Douds* and confirmed by subsequent decisions" *(United States v. Brown,* No. 399, O.T. 1964, Government Brief, 14-15). It was further contended that "Congress was certainly warranted in drawing the line at Communist Party membership, regardless of the particular member's activity or commitment" [i.e., to the apprehended evil and the Party's program] *(ibid,* 22), and that, to the extent that 9(h) and 504 differed from each other, 504 was not "unreasonably broad," but rather was "more appropriately and fairly calculated to achieve the legislative purpose" *(ibid,* 30).

Insofar as our own brief sought to differentiate between Section 9(h) and Section 504, the effort was, of course, to urge that Brown's case was not necessarily controlled by the decision in *Douds (United States v. Brown,* No. 399, O.T. 1964, Brief of Respondent, 28 et seq.). We sought chiefly to support, by argument, the decision of the Court of Appeals which had decided in Brown's favor on First and Fifth Amendment grounds. However, our brief shows that, despite our main reliance upon the grounds on which the Court of Appeals had rested its decision, not only did we separately urge the bill of attainder point, but throughout

our discussion of the First and Fifth Amendments, as well as in our treatment of other issues, the logic of the argument compelled us time and time again to remark on the attainting feature of the statute *(ibid,* 20, 30-32, 39, 43, 48, 51, 56, 58, 59-60, 62-63). Moreover, our contention so far analogized the two sections that we concluded our brief with the request that *Douds* be reexamined and overruled *(ibid,* 65 et seq.). We make the same argument here, in the belief that no meaningful difference can be found between the two statutes, and that the reasons for striking down 504 equally call for a decision that 9(h) is invalid.

It is appropriate to recall this Court's observation in *Brown* that wide variations in form, purpose and effect are found in the bills of attainder that had been in use in early America and during the Sixteenth, Seventeenth and Eighteenth Centuries in England (381 U.S. at 442). It is also to be noted that sharp contrasts in form may be seen in a comparison of the state constitutional provision in *Cummings* and the statutes involved in *Garland, Lovett,* and *Brown*—all of which were held to be bills of attainder. In light of these facts, we do not see how the surface differences between 9(h) and 504, existing only in respect of their tactical approach to the solution of the same supposed problem, can save 9(h), upon application of this Court's rationale in *Brown,* from a fate similar to that of Section 504. In this precise area, we have been admonished as to the nature of bills of attainder, in these words:

> "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing,

not the name" *(Cummings v. Missouri,* 4 Wall. at 325 [1867]).

The two sections are plainly indistinguishable in the intent and purpose with which they were passed, and we assume this much will be conceded by the Government. In its brief to this Court in *Brown,* the Government argued as follows:

> ". . . [Section 504] was enacted in 1959 to meet the very same problem that moved Congress to pass Section 9(h) in 1947." *(United States v. Brown, supra,* Government Brief, 14).
>
> "It is clear that Congress' purpose in enacting Section 9(h) and Section 504 was to eliminate the threat of Communist-controlled political strikes by 'wholly eradicat[ing] and bar[ring] from leadership in the American labor movement, at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government.'" *(ibid,* 29).

That both sections imposed punishment, is also clear. In the one case, pressure was brought to bear to remove a union leader from office by the threat of imprisonment if he failed to disassociate himself from the Communist Party. In the other case, the pressure to force him from office emanated from the threat that the union would otherwise become vulnerable to rival attack and, being barred from participation in elections or other proceedings conducted by the National Labor Relations Board, must succumb.[32]

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[32]The pressure exerted by 9(h) was summarized by Chief Justice Vinson as follows: "For example, a union whose officers do not file an affidavit in compliance with §9(h) may not enter into a union

But the difference between the direct and indirect force exerted, in the context of the situation dealt with, was not deemed by Congress to involve any considerations other than those of expediency, and in the Government Brief to this Court in *Brown,* it was argued that no essential distinction exists between the force employed in the one statute and that which is used in the other:

"Section 504, like Section 9(h), does not directly restrict speech and association but touches these constitutionally protected liberties only conditionally. * * * [Prevention of political strikes] could not be achieved by any less 'drastic' means than the kind of statute represented by Section 504 and its predecessor, Section 9(h)." *(United States v. Brown, supra,* Government Brief, 8-9).

"By requiring all union officers to file non-communist affidavits and then denying the facilities of the National Labor Relations Board to unions whose officers had not filed the affidavits, Congress *sought to apply the squeeze to union members in the expectation that potential Communist officers would feel the pinch.* Section 504, on the other hand, announced a 'flat prohibition'". *(ibid,* 29-30; italics supplied).

"For if, as the compliance records demonstrate, a union did not really have the practical alterna-

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shop contract with an employer, as it was free to do before passage of the National Labor Relations Act. A non-complying union is excluded from the ballot in representation proceedings. If another union is certified, the non-complying union incurs the disabilities of §§8(b)(4)(C) and 303(a)(3), as it would not have done prior to 1935. Similarly, certain strikes and boycotts are prohibited to non-complying unions by §§8(b)(4)(B), 8(b)(4)(C), and 8(b)(4)(D) of the Act" *(American Communications Assn. v. Douds,* 339 U.S. 382, 390, n. 6 [1950]).

tive of doing without Board remedies and electing Communist Party members to union offices, a Communist Party member who wished to become a union officer was as fully denied the right to retain Communist Party membership as if a 'flat prohibition' or statute applicable 'directly upon the individual' were on the books." *(ibid,* 43).

"Prospective union officers who wished to associate with the Communist Party could not realistically weigh the non-criminal consequences of retention of such membership; it was just practically unfeasible for a union—particularly a small or weak one—to expect to be successful if it was denied access to the Board. Hence the non-criminal aspect of Section 9(h)'s sanction could simply be taken as an absolute bar." *(ibid,* 44).

Finally, the result achieved, in terms of the impact made upon the persons subjected to the two statutes, was the same in both instances. As the Government further argued in its brief to this Court in *Brown:*

". . . [Section 504] achiev[ed] much the same practical result as Section 9(h) . . ." *(United States v. Brown, supra,* Government Brief, 11).

"* * * [I]n this case, as in *Douds,* the sum total of the harmful effect of the regulation is that it 'results in an indirect, conditional, partial abridgement of speech.' 339 U.S. at 339. Section 504, like Section 9(h), 'touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint.'" (*ibid,* 17).

"* * * Section 504 . . . did not substantially alter the incidental abridgement of free association which accompanied the predecessor statute . . ." (*ibid*, 41).

"* * * [S]uch a 'direct' sanction does not really have a substantially greater impact on First Amendment liberties than the indirect 'discouragement' of Section 9(h). The history of Section 9(h)'s administration has shown that nearly all unions are unable to function without the access to National Labor Relations Board facilities which is provided by the federal labor laws." (*ibid*, 42).

"Moreover, it seems entirely clear that the criminal nature of the sanction does not really exert more 'force' than if the remedy were civil." (*ibid*, 44).

It thus appears that in every essential particular, both statutes possess the same identical features of a bill of attainder: each of them applies in specific terms to the members of the Communist Party; each of them seeks to eliminate Communists from positions of union leadership; each of them proceeds from an assumption that all Communists possess the dangerous likelihood that they will exploit their holding of union offices to instigate political strikes; each of them makes that assumption conclusive and irrebuttable, in disregard of the undeniable fact (as well as this Court's frequent pronouncements on the subject) that the individuals who belong to the Communist Party do not all "subscribe unequivocally to all of its platforms or asserted principles" (*Schneiderman v.*

United States, 320 U.S. 118, 136 [1943]); each of them not only makes the automatic inference that "all members share[e] [the same] evil purposes or participat[e] in [the same] illegal conduct" *(Schware v. Board of Bar Examiners,* 353 U.S. 232, 246 [1957]), but renders it impossible to show, in any given instance, that no relationship whatever can be demonstrated "between the characteristics of the person involved and the evil Congress sought to eliminate" *(United States v. Brown,* 381 U.S. 437, 456 [1965]); and, finally, each of them inflicts a legislative punishment falling alike on guilty and innocent, without requiring or permitting any of the safeguards of a judicial trial. The fact that the punishment employs "indirect" force in Section 9(h) rather than "direct" force as in 504, is no more relevant than the fact that 504 was restricted to "members of the Communist Party" whereas 9(h) sweeps even more broadly by applying also to persons "affiliated" with that Party. For as we have shown, the selection of the more "direct" form of punishment employed in 504 was not an original effort to inflict punishment on Communists in the labor movement, but was rather an outgrowth of the dissatisfaction that was felt at the seemingly inadequate results achieved under 9(h), even after its punitive force had been buttressed by the *in terrorem* conditions created by the Communist Control Act of 1954. Between 1947 (when 9(h) was adopted) and 1959 (when it was supplanted by 504), no political strikes or other interferences with interstate commerce had occurred as would confront Congress with

a situation calling for a generically different attack against Communists in the labor movement. The two statutes, then, must stand or fall on the same "constitutional principles"—we have the Government's word for that *(United States v. Brown,* No. 399, O.T. 1964, Government Brief, 8, 12).

It is plain, we think, that just as the Congressional action taken against Lovett was a bill of attainder because "the statute was the product of a congressional drive to oust from the government persons whose (congressionally determined) 'subversive' tendencies made their continued employment dangerous to the national welfare", spurred on by the purpose "to 'purge' the then existing and all future lists of government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job" (*United States v. Brown, supra* at 460), so Section 9(h) fits the description of its successor 504, of which this Court said "[T]he purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill positions which might affect interstate commerce" (*ibid,* 460). It was because the decision in *Lovett* was "misread" *(United States v. Brown,* 381 U.S. 437 at 460) that Section 9(h) was not condemned as a bill of attainder when the question was considered in *Douds.* And the holding in *Brown* that 504 was forbidden by Article I, Section 9 of the Constitution necessarily implied that *Douds* must be overruled, and that 9(h) must be invalidated

(United States v. Brown, supra, dissenting opinion at 464, 465). Such was also the opinion expressed the following year by Justices Black and Douglas, who were of the view that 9(h) should have been declared unconstitutional as a bill of attainder when that section was before the Court in *Dennis v. United States,* 384 U.S. 855, 875 [1966]). For reasons not applicable to this case, as we later show, the issue was not then decided. We submit that the time for making that decision is here and now.

It cannot be too often repeated that the Constitution forbids Congress from exercising *in any guise* the powers reserved to the courts. When there exists between Government and any of its citizens a disputed issue of fact upon whose resolution depends the infliction of punishment, the task of adjudication has been confided exclusively to the judiciary. Congress may, of course, make findings for its legitimate legislative purposes, and on the strength of such findings may adopt statutes of general application as a part of its law-making functions.[33] But Congress cannot decide *ex parte* that Hugh Bryson constitutes a danger to the Nation and, on that basis, condemn him to punishment in any form at all, be it death, imprisonment, loss of job, pressure exerted to force surrender of his

[33]Congress may not, however, preclude this Court by engaging in distorted fact finding *(cf. Cox v. Louisiana,* 379 U.S. 536 [1965] at 545, n. 8, and cases there cited).

constitutionally-protected rights and liberties, or even a public statement of condemnation injurious to his reputation and hurtful to his family. It certainly cannot do this by open legislative fiat (*United States v. Lovett,* 328 U.S. at 316-317), and what it cannot do directly, it may not do by indirect means. It is no less an exercise of judicial functions for Congress, instead of avowedly purporting to find or assume Bryson to be guilty of the supposed offense, to produce the same result by throwing him into a common cauldron with others and spelling out a description that, in covering all such persons, necessarily includes him as an individual.[34] Between any such efforts of this nature and the classical bills of attainder utilized in variegated forms in the times of Charles I and James II, the difference lies only in the degree of sophistication with which the same identical purpose is pursued. The same intent is present, and the same result follows.

We do not mean to disparage the right of Congress to be concerned with political strikes, nor do we deny that it is for Congress to enact general legislation to deal effectively with any problems created by the threat of political strikes. We may assume that a law prohibiting strikes for defined political purposes, and imposing penalties for violation of that law, could be drawn without offending the Con-

[34] "That the persons legislatively punished were not named was a mere detail of identification." (*United States v. Lovett,* 328 U.S. 303, 327 [separate opinion of Mr. Justice Frankfurter, construing the oaths involved in *Cummings* and *Garland*]).

stitution.[35] Congress has, for example, adopted legislation of that nature in its treatment of the problems created by jurisdictional strikes, secondary boycotts, and the like, without any felt need to enact bills of attainder (Section 8 of the Labor Management Relations Act, 29 U.S.C. 158(b)(4)(B) and (D)). If it be urged, in opposition, that Congress need not wait for the evils of political strikes to occur, additional steps are readily available; for example, the use of the courts' injunctive processes, as in national emergency strikes, to provide time in which to dissipate the impetus for such strikes (Section 208 of the Labor Management Relations Act, 29 U.S.C. 178). If this still is thought to be inadequate, there are yet other things that can be done, including provision for administrative hearings if that is considered desirable; and in any event, at all times, penalties may be imposed for wilful violation of a court's orders, both in restraint and in enforcement, that are not necessarily limited to

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[35]In point of fact, we have been unable to find in the legislative background of 9(h), or in other relevant bibliographical materials, any well-reasoned presentation against the validity, let alone the conceivable desirability, of "political strikes." The term has no settled meaning; however, it has been called "the refusal to perform a civic duty or a private job in order to compel a change in political policy." (Ziskind, One Thousand Strikes of Government Employees, Columbia University Press [1940], 7). Why would not a president of the United States have the right to call on the American people to engage in a strike to demonstrate their support for his program against the obstructionism of a recalcitrant Congress? Could Congress constitutionally legislate to prohibit such an occurrence? If the situation were reversed, could not Congress solicit the trade union memberships to lay down their tools as an expression of disapproval of a president's policy? To be sure, these are not likely possibilities but they do point up the too simple readiness to ascribe disloyal motives to any strike initiated for "political" as distinguished from economic purposes.

only an 80-day period, but which would be carefully tailored in each case, as is customary in judicial proceedings, to the given fact situation before the court. Finally, if all this panoply of powers is not deemed enough, a general law could presumably be drawn to provide that anyone who occupies union office for the purpose or with the intent of calling political strikes, or is about to do so, or is likely to do so, shall be punished by removal from office. For purposes of argument, we assume such a law might not offend the Constitution; indeed, if such a law were to be unconstitutional, then assuredly 9(h) is. The point of our argument is that Hugh Bryson would thus have had a chance to meet the accusation that his continued occupancy of union office actually would, or reasonably might be supposed to, present a threat to the country.[36] A trial would afford the Government full opportunity to prove any of its assertions against

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[36]Among the specious assumptions concealed by the statute, is that the petitioner was or ever could be in any position to call a political strike, even if he wanted to. Only those who are totally ignorant of American labor unions can truly suppose that all that needs doing for a strike to be called is for a union leader to press a button, at which American workers promptly leap to the opportunity to terminate their sources of livelihood. All unions are governed by constitutions and established practices that control the calling of strikes; these invariably make it difficult, not easy, to strike; e.g., in the case of petitioner's union, a requirement existed for the conduct of a secret referendum vote of all members on all ships as well as the members ashore before a strike could be authorized.

It was not charged or proved that petitioner had ever advocated a political strike. In fact, his union had engaged in only one strike, for economic reasons alone, subsequent to the famed West Coast strikes of 1934 and 1936. The Congressional "findings" seem to rest on the belief that American workingmen are too stupid, too unpatriotic, and too strike-happy to be entrusted with the right to exercise the franchise.

him, and a like opportunity to Bryson to defend against the charge—to prove, if he could, to the satisfaction of court and jury that, far from posing a threat to the safety and welfare of the Nation, he was loyally disposed to his country, and utterly unwilling to call or support a political strike, notwithstanding any associations he previously had sustained with members of the Communist Party or the Party itself. If any valid reason existed to remove him from office, such a trial would accomplish the Congressional purpose, and it would do so without offering Bryson up as a sacrificial lamb on the twin altars of expediency and hysteria—nor, what is worse, establishing the precedent, with all its ominous implications, that any citizen can be shorn of his most precious rights without the slightest semblance of a judicial trial.

(B) On its face and as applied to the petitioner, Section 9(h) also abridges rights of speech, assembly and association, in violation of the First Amendment and deprives of liberties and property without due process of law, in violation of the Fifth Amendment.

It would be difficult, we submit, to imagine a law which, possessing the essential characteristics of a bill of attainder, could possibly avoid conflict with the command of the Fifth Amendment that no person shall "be deprived of life, liberty or property without due process of law," for the very essence of bills of attainder, as we have shown, is precisely to deprive their victims of due process. And when the activities that Congress purports to be regulating involve the political beliefs of an individual, then, whether such beliefs are expressed in association with others or

without such association, the legislation cannot fail to violate the First Amendment as well. The necessary and inevitable effect is to discourage freedom of expression; indeed, that is its purpose and design. It comes, therefore, as no surprise that Section 9(h), whose purpose, effect, and means of operation are those of a bill of attainder, should also contravene both the First and Fifth Amendments.

It is unnecessary, we think, to demonstrate that the area dealt with here, is that in which are to be found rights protected by the First Amendment. Although the constitutional attack on 9(h) was unsuccessful in *Douds,* it was not for want of proof that First Amendment rights were abridged by the statute; the Court recognized this to be so, saying, ". . . Congress has undeniably discouraged the lawful exercise of political freedoms . . ." and that the law had the " . . . necessary effect of discouraging the exercise of political rights protected by the First Amendment." (339 U.S. at 393.) The abridgement was thought, however, to be justifiable because the Congressional interest was, on balance, found to be sufficiently great to warrant the action taken (339 U.S. at 406), accordingly the individual's rights were held to lose their protected character. With all respect, we think that the rationale of *Douds* leads only to the conclusion that the fundamental rights there involved had lost the protection of the Court, not of the Constitution, and that this unfortunate result reflects chiefly the inappropriateness of applying the test there used.

That test—of "balancing" an asserted Congressional interest against the freedoms infringed—has never commanded the adherence of a majority of the Court for a sufficient period of time, or with a sufficient degree of attachment as to its utility, propriety, or scope, to settle the troublesome questions raised by it, and no unbroken line of decisions has been produced that rely unwaveringly on the use of that test; nor has there been unvarying agreement among the proponents of that test on the results to be reached by resorting to it. To the contrary, the relevant decisions have in some instances resulted in this Court supporting the claim of the individual against the Government or the State—in other instances that involve scarcely distinguishable fact situations, opposite results have been reached. (Compare *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716 [1951] with *Baggett v. Bullitt,* 377 U.S. 360 [1964]; *Barenblatt v. United States,* 360 U.S. 109 [1959] with *Watkins v. United States,* 354 U.S. 178 [1957]; *Konigsberg v. State Bar of California,* 366 U.S. 36 [1961] with *Schware v. Board of Bar Examiners,* 353 U.S. 232 [1957]; *Adler v. Board of Education,* 342 U.S. 485 [1952], with *Keyishian v. Board of Regents,* 385 U.S. 589 [1967]; *Scales v. United States,* 367 U.S. 203 [1961] with *Noto v. United States,* 367 U.S. 290 [1961]; and see *N.A.A.C.P. v. Alabama,* 357 U.S. 449 [1958], *Sweezy v. New Hampshire,* 354 U.S. 234 [1957], *Aptheker v. Secretary of State,* 378 U.S. 500 [1964] and *United States v. Robel,* 389 U.S. 258, 268 n. 20 [1967]).

On all occasions, the use of the balancing test has never failed to evoke strong criticism, particularly in cases involving oaths. (See, for example, *In re Summers,* 325 U.S. 561, dissenting opinion at 573 [1945]; *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716 [1951], dissenting opinion at 731; *Barenblatt v. United States,* 360 U.S. 109 [1959], dissenting opinion at 134; *Braden v. United States,* 365 U.S. 431 [1961], dissenting opinion at 438; *Konigsberg v. State Bar of California,* 366 U.S. 36 [1961], dissenting opinion at 56; and *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 [1961], dissenting opinion at 137.)

Granting the difficulties that are posed when an Act of Congress abridges rights concededly protected by the First Amendment (as cannot be denied in regard to 9(h)), we submit that this Court should unhesitatingly denounce any such law as unconstitutional. When all the deference has been paid to Congress that is its rightful due, the fact remains that Congress, like this Court and the Executive, must exercise its powers within the limitations of the Constitution. And when it does not do so, this Court must act. As Chief Justice Taft (in another context) said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional

> legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards." (*Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 [1922].)

Just as Congress may not invade powers reserved to the States, it is equally forbidden to invade the domain of the judiciary (Constitution, Article I, Section 9; Article III, Section 1), or to enact laws that abridge rights secured by the First Amendment or deprive of personal liberties or property without the due process for which the Fifth Amendment provides. In this case, Congress has offended the Constitution both in respect to this Court and to all persons affected by the law. As Mr. Justice Black aptly said, 9(h) is a "constitutionally doubly prohibited freedom-destroying, legislative bill of attainder." (*Dennis v. United States*, 384 U.S. 855, 881.)

The liberties of our people, as prescribed in the Constitution, cannot, we submit, long tolerate a case-by-case method of weighing Congressional interests against First Amendment freedoms,[37] and history

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[37] Adherence to the balancing test has led to the appearance, in a concurring opinion, of the following statement, "We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it." (*Dennis v. United States*, 341 U.S. 494, concurring opinion at 525 [1951].) If these words mean what they appear to mean, their unqualified application in practice would threaten to effect a judicial repeal of the First Amendment. It is, we submit, important to remember, as we have been reminded, that "the First Amendment . . . absolutely forbids such laws without any ifs or buts or whereases" (*Beauharnais v. Illinois*, 343 U.S. 250, dissenting opinion at 275 [1952]).

provides no reason for adopting that method. No such balancing process is to be found in the famous dissenting opinions of Holmes and Brandeis (*Schaefer v. United States,* 251 U.S. 466, 482 [1920]; *Pierce v. United States,* 252 U.S. 239, 253 [1920]; *Gitlow v. New York,* 268 U.S. 652, 672 [1925]; *Whitney v. California,* 274 U.S. 357, 372 [1927] [concurring opinion]), nor in the decisions of this Court where, persuaded by the doctrine expounded by Holmes and Brandeis, the freedoms and liberties of the people were extended and given vigorous protection, limited only by the clear and present danger test. *(DeJonge v. Oregon,* 299 U.S. 353 [1937]; *Herndon v. Lowry,* 301 U.S. 242 [1937]; *Bridges v. California,* 314 U.S. 252 [1941]; *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 [1943]).

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." *(Thomas v. Collins,* 323 U.S. 516, 530 [1945]).

It was from these beginnings that this Court developed and expanded its protection of the freedom of expression which the Framers of the Constitution intended, as shown by the language they chose, to be absolute. Far from undertaking to "balance" conflicting interests between the legislative body and the

citizen, the rule was that, whenever rights guaranteed by the First Amendment were involved, the presumption was in favor of the rights, not the Government (*United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 [1938]; *Schneider v. Irvington*, 308 U.S. 147, 161 [1939]; *Thomas v. Collins*, 323 U.S. 516 [1945]). These "freedoms . . . are to be presumed to be invulnerable and any attempt to sweep [them] away" is "prima facie invalid" (*Prince v. Massachusetts*, 321 U.S. 158, dissenting opinion at 173 [1944]). Under the clear and present danger test, only the most essential, indeed indispensable, restrictions on the exercise of freedom of expression may be permitted, and then only if a statute is narrowly drawn, with meticulous specificity so as to result in the least possible infringement on rights (*Lovell v. Griffin*, 303 U.S. 444, 451 [1938]; *Schneider v. Irvington*, 308 U.S. 147, 162-164 [1939]; *Hague v. C.I.O.*, 307 U.S. 495, 516 [1939]; *Thornhill v. Alabama*, 310 U.S. 88, 97-98 [1940]; *Carlson v. California*, 310 U.S. 106, 112 [1940]; *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 [1940]; *Saia v. New York*, 334 U.S. 558 [1948]; *Shelton v. Tucker*, 364 U.S. 479 [1960]; *Schneider v. Smith*, 390 U.S. 17 [1968]). For these rights occupy a "preferred position" in our scheme of constitutional government (*Jones v. Opelika*, 316 U.S. 584, dissenting opinion 600, 608 [1942]; *Murdock v. Pennsylvania*, 319 U.S. 105, 115 [1943]; *Prince v. Massachusetts*, 321 U.S. 158, 164 [1944]; *Follett v. McCormick*, 321 U.S. 573, 577 [1944]; *Marsh v. Alabama*, 326 U.S. 501, 509 [1946]; *Saia v. New York*, 334 U.S. 558, 561, 562 [1948]. Legislation so drawn as to result in chill-

ing effects on First Amendment rights, with consequent stifling of freedom of thought, will not be tolerated *(Keyishian v. Board of Regents,* 385 U.S. 589 [1967]; *Elfbrandt v. Russell,* 384 U.S. 11 [1966]; *Dombrowski v. Pfister,* 380 U.S. 479 [1965]; *Aptheker v. Secretary of State,* 378 U.S. 500 [1964]). For these are "privileged" rights (*NAACP v. Alabama ex Rel. Patterson,* 357 U.S. 449, 460 [1958]). They are "supremely precious in our society" *(NAACP v. Button,* 371 U.S. 415, 433 [1963]). And they have been "enshrined in the First Amendment of the Bill of Rights" *(Sweezy v. New Hampshire,* 354 U.S. 234, 250 [1957]).

The teachings of these cases take on added luster when one turns to facts such as are found here, facts that present a particularly egregious instance of the kind of miscarriage of justice that occurs when courts, out of an undue deference to legislators, allow conjecture to be substituted for fact, and individual guilt to be irrebuttably presumed from mere noncriminal association. The assumption made in *Douds* was that any person must unavoidably know whether he was swearing falsely, hence only those would be convicted who knew perfectly well that they were lying, for "no honest, untainted interpretation of those words [i.e., 'affiliated', 'supports' and 'illegal or unconstitutional methods'] is punishable . . ." (339 U.S. at 412, 413). The reality is that no man can truly be sure what is meant by such a word as "affiliation," a word that has plagued judges and lawyers alike, and of which it has been said in a case involving this very Section 9(h):

"And what does it mean to be 'affiliated'? The Supreme Court, in *Bridges v. Wixon, supra,* devoted several pages to the meaning to be attributed to the word 'affiliation,' as used in the deportation statute. The court's discussion is convincing that its meaning is quite beyond the reach of the ordinary citizen." (Circuit Judge Major in *Inland Steel Co. v. National Labor Relations Board,* 170 F.2d 247, 262 [7 Cir. 1948]).[38]

Should any person be compelled to take the risk of speculating about the meaning of a law?

"Men of common intelligence cannot be required to guess at the meaning of the enactment" (*Winters v. New York,* 333 U.S. 507, 515 [1948]).

". . . a statute which either forbids or requires the doing of an act in terms so vague that men

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[38]"Affiliation" is an elusive concept whose components are variously, perhaps contradictorily, identified in the cases. But at the least, it would seem that some element must be present that ties the accused to the illegal purpose or illegal activities of the organization—". . . meaningful association" that is not ". . . wholly devoid of any political implications" *(Rowoldt v. Perfetto,* 355 U.S. 115, 120 [1957]); the word is not to be applied in "a broad, fluid sense" or given "too loose a meaning" or applied so as to visit hardship "for slight or insubstantial reasons"; "But unless he also joined in that overall program [i.e., unlawful objectives] he would not be 'affiliated' . . ." *(Bridges v. Wixon,* 326 U.S. 135 at 147, 149 [1945]).

At petitioner's trial, the jury interrupted its deliberations to request a Webster's Dictionary: it was having difficulty, the Foreman said, with "the words 'affiliation' and 'member' " and wanted "elaboration on those two terms." *(Bryson v. United States, supra,* n. 2, Reporter's Transcript on Appeal, 1170-1171.) The dictionary was refused, the Court saying, "I can assure you that if there is anything in Webster's Dictionary that I thought would help you on it, you'd have it" *(ibid);* no elaboration was given. (See also *Bryson v. United States,* No. 171, O.T. 1957, Petition for Writ of Certiorari, 12-13; and also 27, showing that the jury took a written poll to decide whether "affiliated" and "member" were the same or different—5 thought they were the same, 7 thought they were different).

of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *(Connally v. General Constr. Co.,* 269 U.S. 385, 391 [1926]).

Plainly, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes" *(Lanzetta v. New Jersey,* 306 U.S. 451, 453 [1939]), and when "Words . . . are vague and fluid" they "may be as much of a trap for the innocent as the ancient laws of Caligula" *(United States v. Cardiff,* 344 U.S. 174, 176 [1952]. ". . . [T]he exaction of obedience to [such] a rule or standard" is to command obedience to something "so vague and indefinite as to be really no rule or standard at all" *(Champlin Ref. Co. v. Corporation Com. of Oklahoma,* 286 U.S. 210, 243 [1932]). "All are entitled to be informed as to what [Government] commands or forbids" *(Lanzetta v. New Jersey, supra,* at 453).

The attorneys who counseled petitioner in 1951 that on the facts of his case, he was entirely free, as a matter of law, to subscribe to the oath, were entitled to think that their advice drew sound support from such decisions as *De Jonge v. Oregon,* 299 U.S. 353 (1937), *Herndon v. Lowry,* 301 U.S. 242 (1937), *Schneiderman v. United States,* 320 U.S. 118 (1942), *Bridges v. Wixon,* 326 U.S. 135 (1945), and *United States ex Rel. Kettunen v. Reimer,* 79 F.2d 315, 317 (2 Cir., 1935); and they could later properly claim that the accuracy of their advice was confirmed by the subsequent decisions in *Schware v. Board of Bar Examiners,* 353 U.S. 232

(1957), *Yates v. United States,* 354 U.S. 298 (1957), *Rowoldt v. Perfetto,* 355 U.S. 115 (1957), *Scales v. United States,* 367 U.S. 203 (1961), *Noto v. United States,* 367 U.S. 292 (1961), *Aptheker v. Secretary of State,* 378 U.S. 500 (1964), *Dombrowski v. Pfister,* 380 U.S. 479 (1965), *Elfbrandt v. Russell,* 384 U.S. 11 (1966), and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). They could even point to *Douds* itself, where fewer than five Justices had thought "affiliation" to be an acceptable statutory term, and where Chief Justice Vinson observed that Communists "carry on legitimate activities" *(American Communications Assn. v. Douds,* 339 U.S. 382, 393 [1950]) and no person holding innocent beliefs need have any anxiety "while this Court sits" *(ibid,* 410). Yet none of these assurances protected the petitioner from prosecution, conviction and imprisonment, although he twice sought relief from this Court (355 U.S. 817; 360 U.S. 919).

If lawyers can be thus misled, what may be expected of the layman who acts on the advice of lawyers?[39] Is he bound to assume the peril that, in his case, no attention will be paid to the doctrine expressed in this Court's decisions: that even assuming illegal aims or activities of some members of the Communist Party, "it cannot automatically be inferred that all members shared their evil purposes or participated

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[39] "That is what lawyers are for. If consultation with counsel indicates anything, it shows a desire to conform with legal requirements to obey the law." *(Schwarzenbach-Huber Co. v. National Labor Relations Board,* ____ F. 2d ____ [2 Cir., 1969], 37 U.S.L.Wk., [March 5, 1969], per Medina, J.)

in their illegal conduct" (*Schware v. Board of Bar Examiners,* 353 U.S. 232, 246 [1957]), for "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted beliefs" (*Schneiderman v. United States,* 320 U.S. 118, 136 [1943]); that "it is difficult to perceive how the requisite specific intent to accomplish such overthrow [of government] could be deemed proved by a showing of mere membership or the holding of office in the Communist Party" (*Yates v. United States,* 354 U.S. 298, 331 [1957]); that a person may not be punished "for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share" (*Noto v. United States,* 367 U.S. 290, 299-300 [1961]); that Congress may not ignore "plainly relevant considerations such as the individual's knowledge, activity, commitment and purposes" (*Aptheker v. United States,* 378 U.S. 500, 514 [1964]); that the justification for punishing an individual requires evidence that "must be sufficiently substantial to satisfy the concept of personal guilt" (*Scales v. United States,* 367 U.S. 203, 224-225 [1961]); and that "it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party" (*Noto v. United States,* 367 U.S. 290, 299 [1961])?

These considerations give emphasis to the importance of the principles enunciated in the cases on which we here rely: that statutes such as 9(h) are

impermissibly vague; they give no adequate definition of what is proscribed; they provide no ascertainable standard to be applied at trial for the guidance of judge and jury, and the exoneration of the accused when it is merited; they operate, in fact, to enmesh and entrap the unwary and the innocent into a criminal conviction based on nothing more than innocuous associations, despite the fact that the theory of guilt by association is obnoxious to our system of justice (*Elfbrandt v. Russell,* 384 U.S. 11 [1966]; *Bridges v. Wixon,* 326 U.S. 135 [1945]). Such human tragedy as befell petitioner here ought not to occur, and there would be infinitely less chance of its occurrence if Congress were held strictly to account in matters of elementary due process; or, to put the matter differently, if the American people could be assured in advance that the rules laid down in the Constitution may be relied upon; that the vital interest of the American people in freedom of expression will not be smothered because some supposed higher interest in government dictates obeisance; that an exercise of associational rights will not subject the American people to the risk, on an *ad hoc* basis, of some of them being convicted and imprisoned while others are adjudged guiltless of crime on substantially the same facts; and that those who bear responsibility to legislate within the framework of the Constitution will receive no judicial deference whatsoever when they flaunt the Constitution with their "seeming laws" (Chief Justice Taft, in *Bailey, supra,* 259 U.S. at 37) that create innocent victims and would make conforming puppets of us all. "Our

whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (*Stanley v. Georgia,* ..... U.S. ....., 37 U.S.L.Wk. 4315, 4317 [April 7, 1969]. The Nation would be on safer ground, we submit, if closer heed were paid to wise counsel:

> "The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." (Chief Justice Marshall, in *Marbury v. Madison,* 1 Cranch 137, 176 [1803]).

II.

PETITIONER IS ENTITLED, UNDER THE POST-CONVICTION STATUTES, TO HAVE HIS CRIMINAL CONVICTION SET ASIDE AND TO BE RELIEVED OF THE REMAINING DISABILITIES OF THAT CONVICTION.

Petitioner contended in the District Court that jurisdiction of his motion was grounded on both 28 U.S.C. 2255 and 28 U.S.C. 1651 (App. 6, 13). The District Court found[40] that it had jurisdiction under 28 U.S.C. 2255, and, alternatively, under 28 U.S.C. 1651. The Court of Appeals considered neither statute, stating

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[40]The District Court directed that its "Order Setting Aside Conviction and Sentence" (App. 26) constitute its "findings of fact and conclusions of law." (App. 43). F.R.C.P., Rule 52.

that *Dennis v. United States,* 384 U.S. 855 (1966), compelled it to hold that petitioner had no standing to attack the constitutionality of 9(h) (App. 45).

We shall show that both 28 U.S.C. 2255 and 28 U.S.C. 1651 invest the federal courts with jurisdiction of petitioner's cause, and that nothing in *Dennis* deprives him of standing to attack the constitutionality of 9(h).

(A) Petitioner qualifies for relief under 28 U.S.C. 2255.

In pertinent part, Section 2255 provides that:

> "A prisoner in custody under the sentence of a [federal] court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . of the United States, or that the court was without jurisdiction to impose such sentence . . . or [that the sentence] is otherwise subject to collateral attack, may move the court . . . to vacate, set aside or correct the sentence."

Our brief here has argued that the sentence imposed upon petitioner in 1955 was in violation of the Constitution of the United States; it was therefore not within the jurisdiction of the court to impose, and, accordingly, is now subject to collateral attack. In the District Court, the Government contended that, inasmuch as petitioner had been released on parole prior to the institution of the proceeding below, he did not satisfy the "in custody" requirement of Section 2255 and, therefore, the statute did not confer jurisdiction. Neither the record nor the law supports this position.

Petitioner's motion alleged that by virtue of his inability to pay the entire fine, "the said period of parole [has] continued in effect"; that as a result, he remains "under the supervision" of the probation officer; that he is "required" to make monthly reports to the probation officer; that he cannot travel outside of California without first securing permission from the probation officer, and that he is "subject at all times to the supervisory parole powers" of the probation officer. It also alleged that, as an additional concomitant of the conviction, he has been deprived of his right to vote and to obtain a passport (App. 5-6).

These allegations were not denied, and the District Court found them to be true:

> "Petitioner is presently on parole and a substantial part of his fine ($8,000) remains unpaid. Consequently, his parolee status continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote." (App. 27).

This finding was not assailed as "clearly erroneous," F.R.C.P., Rule 52. It was therefore required to be accepted by the Court of Appeals, as it must be now by this Court.

In addition to these restrictions on petitioner's liberty, it must be remembered that, as a matter of law, the parole board's jurisdiction over him continues "until the fine is paid or otherwise discharged," because the sentencing judge expressly provided for "further" imprisonment for nonpayment. (See *United States v. Gottfried,* 197 F.2d 239 [2 Cir., 1952].

Compare 18 U.S.C. 3535: the issuance of execution shall not discharge the defendant from imprisonment "until the amount of the judgment is paid"; and see *Panno v. United States,* 203 F.2d 504, 509-510 [9 Cir., 1953], and *Callahan v. United States,* 371 F.2d 658, 661 [9 Cir., 1967]). Indeed, *United States v. Baird,* 241 F.2d 170, 175 (2 Cir., 1957), suggests the possibility that petitioner may still be reincarcerated for contempt upon a wilful refusal to obey orders which might issue in proceedings undertaken to collect the balance of the fine.

In view of the aforementioned restraints on petitioner's liberty which were found by the District Court to exist, as well as the further disabilities to which we have referred, there can scarcely be any doubt that petitioner is "in custody" for the purpose of permitting him to invoke jurisdiction under Section 2255. In *Jones v. Cunningham,* 371 U.S. 236 (1963), this Court held that a state parolee was sufficiently "in custody" so that the jurisdiction of the federal courts under 28 U.S.C. 2241[41] should be extended to him:

> ". . . in fact as well as in theory, the custody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the pub-

[41]Both 28 U.S.C. 2241 (dealing with habeas corpus for state prisoners) and 28 U.S.C. 2255 use the identical words "in custody." The two sections have been similarly construed, and "in custody" means the same in each of them *(Kaufman v. United States,* ____U.S. ____, 37 U.S.L.Wk. 4238, 4239 [March 24, 1969]; *United States v. Hayman,* 342 U.S. 205 [1952]; *Matysek v. United States,* 339 F. 2d 394 [9 Cir., 1964]).

lic generally. Petitioner is confined by the parole officer to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice" (*Jones v. Cunningham,* 371 U.S. 236, 242 [1963]).

The restraints upon petitioner's liberty to do and go as he pleases are in no substantial way different from those imposed in *Jones.* Petitioner's duty to report monthly and to secure permission to travel outside the state are restraints sufficient to constitute "custody." (Compare *Hoptowit v. United States,* 274 F.2d 936, 938 [9 Cir., 1960]; *Wapnick v. United States,* 406 F.2d 741 [2 Cir., 1969]; and *United States v. DeMario,* 246 F.Supp. 786, 787 [E.D. Mich., 1965]). For recent further expansions of the "in custody" concept in other contexts, see *Peyton v. Rowe,* 391 U.S. 54, 64, 67 (1968), and *United States v. Myers,* 394 F.2d 619 (3 Cir., 1968); and compare the restrictions on petitioner's liberty with those held in *Carafas v. LaValle,* 391 U.S. 234 (1968), to be sufficient to sustain jurisdiction under the habeas corpus statute:

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which

survives the satisfaction of the sentence imposed on him.' Fiswick v. United States, 329 U.S. 211, 222 . . . (1946). On account of these 'collateral consequences', the case is not moot. Ginsberg v. New York, 390 U.S. 629, 633-634, n. 2 (1968); Fiswick v. United States, supra, at 222, n. 10; United States v. Morgan, 346 U.S. 502, 512-513 (1954)." (*Carafas v. LaValle,* 391 U.S. 234, 237-238).

(B) Petitioner also qualifies for the requested relief under the All-Writs Statute, 28 U.S.C. 1651.

In pertinent part, Section 1651 provides that the District Courts "may issue all writs necessary or appropriate in aid of their . . . jurisdiction and agreeable to the usages and principles of law." Petitioner relied on this section, as well as 2255, to give the District Court jurisdiction of his motion. That Court specifically found that 1651 provided an alternative ground for the assertion of its jurisdiction (App. 29). The Government had argued that this was not a proper case for a writ of error *coram nobis* and that the only relevant statute was 28 U.S.C. 2255 (App. 18-19).[42] In the Court of Appeals, the Government let the point go by default for, despite the District Court's holding that 1651 was an alternative ground of jurisdiction, nowhere in its brief did the Government argue against that determination. As we have already seen, the Court of Appeals did not reach the question at all.

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[42]Nevertheless, the Government argued that 2255 could not be invoked because, in its view, petitioner was not "in custody" (App. 20-21).

The District Court's conclusion that it had jurisdiction under 1651 was manifestly correct, since "custody" is not a prerequisite to relief under that section. (*United States v. Morgan,* 346 U.S. 502 [1954]; *Migdal v. United States,* 298 F.2d 513, 515 [9 Cir., 1961]; *cf. Wapnick v. United States,* 406 F.2d 741, 742 [2 Cir., 1969]). Jurisdiction existed thereunder to hear and determine petitioner's claim upon his allegations (App. 7-13) that the state of the law had changed after his time for direct appeal had expired. (See *Sunal v. Large,* 332 U.S. 174, 181 [1947]).

Even the fact that a prison sentence has been served is not a basis for refusing to assume jurisdiction of a petition filed under Section 1651:

> "The district court denied appellant's petition without a hearing indicating that it had no jurisdiction by reason of the fact that the sentences in the District Court of Arizona had been completed.
>
> "We disagree. One of the purposes of coram nobis is to allow a defendant to attack a conviction notwithstanding the fact that he has completed sentence. United States v. Morgan, supra at 512, 74 S.Ct. 247. A defendant may be harmed by an invalid conviction even after he has served his sentence; i.e., subsequent conviction may carry heavier penalties, and his civil rights may be affected. Coram nobis must be kept available as a post-conviction remedy to prevent 'manifest injustice' even where the removal of a prior conviction will have little present effect on the petitioner. See Mathis v. United States, 369 F. 2d 43 (4 Cir., 1966); see generally, Note,

55 Geo.L.J. 851, 865-870 (1967)." (*Holloway v. United States,* 393 F.2d 731, 732 [9 Cir., 1968]).

In *Harris v. Nelson,* ..... U.S. ....., 37 U.S.L.Wk. 4219, 4223 (March 24, 1969), Mr. Justice Fortas said for this Court that the All Writs Statute "has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve' the rational ends of law."

Here petitioner invoked its use as precisely such a procedural instrument.

(C) Petitioner's right to relief is not subject to forfeit under the disqualifying rule of standing enunciated in Dennis v. United States, 384 U.S. 855 (1966).

The Court of Appeals did not consider petitioner's attack on 9(h) because it held that petitioner had no standing to mount such an attack. This holding, it said, was "compelled" by *Dennis v. United States, supra,* "because there are no significant differences between *Bryson* and *Dennis*" (App. 45).

> "Bryson's inability to reach the constitutional issue defeats his attack on the validity of the conviction and renders unnecessary our discussion of the remaining contentions of the parties" (App. 45).

We submit that the Court of Appeals is plainly in error: (a) petitioner's case is distinguishable from *Dennis* on the point here at issue, because the reasons which were given in Mr. Justice Fortas' opinion for the Court, as grounds for denial to the petitioners of standing to attack the constitutionality of 9(h),

are not present here; and (b) since petitioner is attacking 9(h) in a collateral proceeding rather than on a direct appeal, different considerations apply to the question of standing.

Because the District Court had no difficulty in distinguishing this case from *Dennis* (and rightly so), it did not consider, although petitioner presented (App. 35), the collateral attack argument. The Court of Appeals did not consider it either, saying that its inability to distinguish *Dennis* put an end to the matter. We think that the Court of Appeals erred and that *Dennis* is distinguishable; but even if it were thought to be controlling in the case of a direct appeal, its rationale can have no force in the case of a statutorily authorized collateral attack.

(i) Dennis v. United States, supra, is distinguishable from the case at bar.

Dennis, as both the Government (Br. in Opp. 4) and the District Court (App. 35) recognized, involved the crime of *conspiracy* to violate 18 U.S.C. 1001. That fact in itself constitutes a decisive ground of distinction between *Dennis* and this case.

> "It is the entire conspiracy and not merely the filing of false affidavits, which is the gravamen of the charge." (384 U.S. 855, 860).[43]

Here, there is no "conspiracy", "entire" or otherwise; here there is "merely [the charge of] the filing

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[43] "Because the claimed invalidity of Section 9(h) would be no defense to the crime of *conspiracy* charged in this indictment, we find it unnecessary to reconsider *Douds*" (*Dennis v. United States, supra* at 867; italics supplied).

of [a] false affidavit . . .;" here there was not, as there was in *Dennis,* a "conspiracy, cynical and fraudulent" (384 U.S. 855, 865). Here the District Court found that Bryson, unlike the *Dennis* defendants, "at all times denied the falsity of his affidavit" (App. 35) and that Bryson, unlike the *Dennis* defendants, was acquitted by the jury of the charge of falsifying as to "membership" (App. 36). These findings, supported by the record, cannot be challenged as "clearly erroneous" and therefore are to be taken as true by this Court (F.R.C.P., Rule 52).

In *Dennis,* the gravamen of the charge was that dedicated Communist Party members, acting at the behest of the Party, conspired falsely to pretend to leave it, while in fact remaining within it (384 U.S. at 859); it was this conduct on their part that resulted in a forfeiture of their standing to challenge 9(h). Here, the whole of the case is that a trade unionist who was not a Communist Party member was punished for the mistake of not knowing the meaning which the courts would ultimately attach to the word "affiliation."[44]

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[44]Compare *Shuttlesworth v. City of Birmingham,* ___ U.S. ___, 37 U.S.L.Wk. 4203 (March 10, 1969) in which this Court held that a defendant was entitled to assume that a statute meant what it said on its face and that "with First Amendment rights hanging in the balance," it would not demand "extraordinary clairvoyance" on his part to perceive what a court would find its meaning to be four years later (37 U.S.L. Wk. at 4205). To the same effect, see *Gregory v. City of Chicago,* ..... U.S. ....., 37 U.S.L.Wk. 4213, 4216 (March 10, 1969):

> "The infringement on First Amendment rights will not be cured if the narrowing construction is so unforeseeable that men of common intelligence could not have realized the law's limited scope at the only relevant time, when their acts were committed." (concurring opinion).

The distinction between "conspirators, cynical and fraudulent" (*Dennis* at 865) who engaged in a "voluntary, deliberate and calculated course of fraud and deceit" (*Dennis* at 867) and petitioner who, at most, mistook, while relying on legal advice, the significance of the amorphous term "affiliation," is of paramount importance. As the District Court observed, "Standing is not a rigid concept . . . And it is well it is not." (App. 37). The differences between petitioner and those who engaged in the deliberate, conspiratorial course revealed by the *Dennis* record are of such dimension as to render the Government's reliance on *Dennis* untenable. The District Court was amply justified in reaching the conclusion that "the rule of *Dennis* does not strip petitioner of standing to attack the constitutionality of Section 9(h)" (App. 37).

Nor do the cases cited by this Court in *Dennis* (*Kay v. United States,* 303 U.S. 1 [1938] and *United States v. Kapp,* 302 U.S. 214 [1937]) compel a deprivation of petitioner's right to challenge the constitutionality of 9(h).[45] In the first place, as the District Court pointed out, neither of these cases (nor *Dennis* itself) involved a false statement "which turned upon the construction of a word like 'affiliated'" (App. 36). In

[45]The other cases cited in *Dennis* as "analogous" (384 U.S. at 866)—*United States v. Williams,* 341 U.S. 58 (1951); *United States v. Remington,* 208 F. 2d 567 (2 Cir., 1953); cert. den. 347 U.S. 913 (1954); *United States v. Winter,* 348 F. 2d 204 (2 Cir., 1965); cert. den. 382 U.S. 955 (1965)—are not controlling for substantially the same reasons that *Kay* and *Kapp* are not. In addition, in each case there was "jurisdiction" in the sense that the tribunal was constitutionally empowered to ask the question to which the conceded false answer was given. Here it is the very constitutional basis of the right to ask the question that is at issue.

Kay, the defendant "knowingly and falsely stated that her claims were respectively in the sums of $590 and $650, whereas in fact they were respectively $285 and $150" (303 U.S. at 5). In *Kapp,* the indictment charged a *conspiracy* to defraud the United States in order to secure benefit payments under the Agricultural Adjustment Act, by falsely stating to the Secretary of Agriculture that certain hogs were owned by various producers "when in fact the hogs belonged to one or more of the defendants" (302 U.S. at 215-216). To "flout" the law (*Dennis, supra* at 867) by making obvious misstatements of objective and readily demonstrable facts about which there can be no subjective mistake (e.g., the amount of a claim, the ownership of hogs) is quite a different matter from making a good faith statement (in reliance upon the advice of counsel) that after four years of disassociation one is no longer "affiliated" with the Communist Party. The "principle of law" which in *Kay* and *Kapp* (and *Dennis*) impelled the Court to deny standing to the defendants there is not applicable to petitioner, whose circumstances are so manifestly different.

Additionally, as the District Court also observed, the *Kay* and *Kapp* (and *Dennis*) defendants did not deny that they had lied.

"*Bryson* is a different case" (App. 36).

Moreover, neither *Kay* nor *Kapp* involved a constitutional challenge limited to the precise provision under which the sanction for the alleged falsity was imposed. To the contrary, the challenges there went to the entire statutory scheme. Here petitioner does

not claim that the National Labor Relations Act is unconstitutional. His claim, narrowly put, is only that the Section 9(h) oath is constitutionally infirm. Indeed, in *Kay,* the Government itself did not argue that the defendant had no standing to challenge the validity of the sections under which she was convicted, only that she could not challenge *other* portions of the statute.[46] And the Court, in *Kay,* entertained (although it rejected) a "due process" challenge, on the grounds of vagueness and uncertainty, to the "False Statement" Section (8[a]) of the statute under which the defendant had been convicted (303 U.S. at 7.) It is true that, in *Dennis,* this distinction was regarded as "without force" (384 U.S. at 867), but we suggest that the "governing principle" to which reference was made in that connection related, of necessity, to those who engaged in a "voluntary deliberate calculated course of fraud and deceit" *(ibid).* Since petitioner is not includable in such a category, the *Dennis* "principle" should not apply to him.

It should also be observed that *Kay* and *Kapp* involved situations where the offending statement was made in order to receive a financial benefit from the Government for personal profit; entirely absent was the fact of pressure exerted upon the accused by the

[46]"It should be noted that we do not argue that petitioner is estopped to challenge the validity of Sections 8(a) and 8(e), under which she was convicted. We urge only that the rule . . . precludes petitioner from assailing the other provisions of the statute, under which she has sought benefits." *(Kay v. United States,* No. 991, O.T. 1936, Government's Brief in Opposition to Certiorari, 64.)

Government. This fact was emphasized by the Government in *Kay* in its Brief in Opposition to Certiorari, No. 991, O.T. 1936, saying (at page 7) that the petitioner there had "invoked the statute for purposes of profit to her business and yet seeks now to reject its penal provisions."[47] And in *Kapp,* this Court cited, in support of the proposition that "such questions cannot be raised by those who make false claims against the Government" (302 U.S. at 218), four cases, each of which involved an effort to obtain a financial benefit or bounty from the Government.[48] Thus both *Kay* and *Kapp* are inapposite, for the petitioner here neither sought nor obtained any personal financial benefit for himself, but merely sought, for his union, the removal of "a number of restrictions which would not exist if the Board had not been established . . ." (*American Communications Assn. v. Douds, supra,* at 389-390).

Finally, in each of the cases discussed above, there was no question but what the agency had "jurisdiction" to put the question. Here, if 9(h) is indeed unconstitutional, the Board had no right even to put the question relating to petitioner's "affiliation." The

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[47] In its main brief in *Kay* (at page 62), the Government distinguished licensing cases where the applicant sought no benefit or bounty and where the statute "merely delimits the freedom to engage in business."

[48] *Langer v. United States,* 76 F. 2d 817 (8 Cir., 1935) ("financial gain or profit"); *Madden v. United States,* 80 Fed. 2d 672 (1 Cir., 1935) (embezzlement of funds); *United States v. Harding,* 81 Fed. 2d 563 (D.C. Cir., 1936) ("to secure a profit of $400,000"); *United States v. MacDonald,* 10 F. Supp. 948 (W.D. Mo., 1935) ("to obtain money from the public treasury").

case is therefore analogous to *United States v. Iccardi,* 140 F. Supp. 383 (D.D.C. 1965), in which a question put by a Congressional committee acting beyond its competence was held to be immaterial, so that the answer could not be perjury.[49] And see, to the same effect, *Brown v. United States,* 245 F. 2d 548 (8 Cir., 1957) (grand jury).

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[49]Here, not only had Bryson terminated his Communist associations four years prior to signing the affidavit, not only did he sign in reliance on the advice of counsel, but there was neither claim nor proof that he had ever advocated or furthered prohibited doctrine or activity. These facts, which show that he had every right to believe that he was committing no offense, illustrate the Constitutional impropriety of retroactively holding him responsible for an unforeseeable construction of a term whose scope was so "dubious" (Mr. Justice Frankfurter, separate opinion, *American Communications Assn. v. Douds, supra,* 11-12, n. 10) that "men of common intelligence could not have realized" that an inculpating interpretation would be placed on his conduct *(Gregory v. City of Chicago, supra,* 80, n. 45). Such facts are, in and of themselves, sufficient to require rejection of any claim that the Government was entitled to ask Bryson whether he was "affiliated".

But we venture also to suggest, more broadly, that when Government requisitions information that the Constitution forbids it to demand, it should be permissible for the citizen to regard it as his highest duty to deny the information sought. Otherwise, the passage quoted from Chief Justice Marshall's opinion in *Marbury v. Madison (supra,* 71) would be reduced to meaningless words, and in practice "acts prohibited [to Congress] and acts allowed [would be] of equal obligation." *(ibid).* If it is true that "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example" (Mr. Justice Brandeis, dissenting, in *Olmstead v. United States,* 277 U.S. 438, 485 [1928]), and if "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence" *(Mapp v. Ohio,* 367 U.S. 643, 659 [1961]), then it follows that the citizen should be protected when he resists an unconstitutional bill of attainder, whether his resistance takes the form of open challenge or, from force of circumstance, an untruthful reply. Congress has no right to subject anyone to a political catechism; and since it has no right to put the questions in the first place, it has no right to receive any answers

(ii) Petitioner has standing in this collateral proceeding to invoke the unconstitutionality of Section 9(h).

Dennis was not a case arising under either Section 1651 or Section 2255. Therefore, its strictures against

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at all, and it should not then matter what answers are coerced. The resolution of the threshold issue, that Congress is prohibited from making the demand in the first instance, should bar all else.

This Court does not permit a forced confession to be used against a criminal defendant even if he is patently guilty, for the simple reason that the Constitution forbids the use of power in that fashion; the inquiry begins and ends with a single question, "a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." *(Rogers v. Richmond,* 365 U.S. 534, 544 [1961]). Evidence that would prove the commission of crime will not be received at trial if it has been obtained by unreasonable search or seizure, because the Constitution subordinates the undeniable need for law-enforcement to the transcendent concern "for maintaining the integrity of individual rights" *(Mapp v. Ohio, supra,* at 647). When the guilt of an unrepresented defendant is so crystal clear that even with a lawyer's assistance he must surely have been convicted, this Court "[does] not stop to determine whether prejudice resulted" from the lack of representation *(Hamilton v. Alabama,* 368 U.S. 52, 55 [1961]), for the Constitution's guarantee of counsel for the accused obliterates all other considerations *(Gideon v. Wainwright,* 372 U.S. 335 [1963]). In all these instances, so soon as it appears that Government itself has exceeded the limits of power which may constitutionally be exercised, we proceed no further.

Why should it not be the same with 9(h)? Government is forbidden to "[place its] power . . . behind a racial classification" *(cf., Anderson v. Martin,* 375 U.S. 399 [1964]), and surely the same must be true of religious and political classifications as well. It "has no business penalizing a citizen merely for his beliefs or associations" *(Lerner v. Casey,* 357 U.S. 468, dissenting opinion, 412 at 414 [1958]). It resorts to nothing less than tyranny when its purpose is "to expose for the sake of exposure" *(Watkins v. United States,* 354 U.S. 178, 200 [1957]). When "the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (Mr. Justice Brandeis, dissenting, in *Olmstead v. United States,* 277 U.S. 438, 485 [1928]). To permit the perjury or "false statement" statutes to be used against the citizen who is driven to evasion, is to pervert them from their proper purposes into vehicles of despotic repression, transferring to the individual the moral oppobrium that rightly attaches to the Government itself.

lying conspirators have no relevance at all to post-conviction proceedings. Petitioner's posture here is in no sense the same as that of the defendants in *Dennis*. Unlike them, he does not seek relief upon the ground that an unconstitutional statute forbids prosecution. Prosecution has already occurred; the sentence has been imposed; most of it has been served;[50] and what remains of it, together with the onus of the conviction, is what petitioner seeks to remove. Petitioner's application is not restricted by considerations of appellate review whose relevance ended with the termination of the main trial. His right presently to invoke the unconstitutionality of 9(h) is not impaired by what the jury did at the trial. He is pursuing remedies which Congress has expressly provided for the benefit of those whose sentences have become final.

> "The whole history of the writ[51]—its unique development—reflects a construction of the federal court's habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas corpus is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest

[50]We say "most" because, despite petitioner's incarceration for 23 months and his subsequent satisfactory conduct during the lengthy period of parole (that would ordinarily have expired long ago), he continues to be subject to supervision and to the threat that he "be further imprisoned until said fine is paid or you are otherwise discharged as provided by law."

[51]The court was speaking of habeas corpus, but the principles are equally applicable to Section 2255 proceedings (*supra*, n. 41).

allegations." (*Townsend v. Sain,* 372 U.S. 293, 311-312 [1963]).

If the fact of conviction, without more, were to be equated to "dishonesty" or "fraud", so as to disqualify petitioner from obtaining relief now, Sections 2255 or 1651 would never be available to any defendant who had been found guilty, despite his denial, in any case where falsehood was claimed. In neither the District Court nor the Court of Appeals were we cited to a single case which holds that a defendant's unbelieved assertion (denying the charge of wrongdoing) operates to deprive him of the right thereafter to attack the conviction, the sentence, or the statute under which he was tried. Nor do we know of any case which has held that, while post-conviction relief is available where the offense charged was murder or bank robbery or violation of the narcotics law, an opposite rule governs convictions involving fraud, dishonesty, or the like. The very text of the post-conviction relief statutes rebuts any such supposition, and the cases amply prove our point.

In *Harris v. Nelson,* ..... U.S. ....., 37 U.S.L.Wk. 4219, 4220 (March 24, 1969), Mr. Justice Fortas, speaking for the Court, said of habeas corpus:

> "The scope and flexibility of the writ . . . —its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers."
>
> . . .
>
> ". . . This Court has emphasized, taking into account the office of the writ . . ., that [a] habeas

corpus proceeding must not be allowed to founder in a 'procedural morass'."

Thus the fact that the offense involved was mail fraud did not prevent a disposition on the merits under 2255 *(Kloian v. United States,* 349 F. 2d 291 [5 Cir., 1965]; cert. den. 384 U.S. 913 [1966]). The same principle obtained where the charge was extortion *(Stirone v. United States,* 341 F. 2d 253 [3 Cir., 1964]; cert. den. 381 U.S. 902 [1965]). Even the fact that the defendant had been convicted of conspiracy was not held to present a barrier to his right to invoke the post-conviction relief statutes (*United States v. Sobell,* 314 F. 2d 314 [2 Cir., 1963]); cf., *Kuhl v. United States,* 370 F. 2d 20, 21 [9 Cir., 1966]).

In *Kaufman v. United States,* ..... U.S. ....., 37 U.S. L.Wk. 4238 (March 24, 1969), this Court held that a federal prisoner is entitled to seek relief under Section 2255 on his claim that evidence used against him was obtained in violation of the command of the Fourth Amendment, even though he did not raise the issue at trial nor deny his guilt.[52]

> "The provision of Federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights . . . requires the continuing availability of a mecha-

[52]Contrariwise, petitioner here did raise the issues at his trial (*supra,* n. 2) and he has constantly denied the charge. Additionally, this case involves the absolute commands of Article I, Section 9, Clause 3 and of the First and Fifth Amendments; it does not involve questions of "reasonableness" as are embraced in the Fourth Amendment. For these reasons, Mr. Justice Black's dissent in *Kaufman* is nowise incompatible with the result petitioner seeks here.

nism of relief." (*Kaufman v. United States, supra,* 37 U.S.L.Wk. at 4240).

. . .

". . . Congress has determined that the full protection of their [federal prisoners'] constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to a full and fair consideration of constitutional claims." *(ibid* at 4241).

Finally, in *Kaufman,* this Court "adopted" the reasoning of Judge Wright's dissent in *Thornton v. United States,* 368 F. 2d 822 (D.C. Cir., 1966) which specifically included, among other grounds justifying collateral reconsideration of a conviction, the fact that "new law has been made . . . relating to the constitutional claim since the trial and appeal" (37 U.S. L.Wk. at 4242, quoting from *Thornton, supra,* 368 F. 2d at 831).

Clearly, it is one of the functions of post-conviction procedures to bring to the attention of the courts convictions based upon unconstitutional statutes and to seek redress from miscarriages of justice (*Sunal v. Large,* 332 U.S. 174 [1927]; cf. *Fay v. Noia,* 372 U.S. 391 [1962]; *Sanders v. United States,* 373 U.S. 1 [1963]). Petitioner's is such a case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the decision in *American Communications Assn. v. Douds,* 339 U.S. 382 (1950) should be overruled. Section 9(h) should be invalidated as a bill of attainder, violative of Article I, Section 9 of the Constitution, and as repugnant to the First and Fifth Amendments.

The order of the District Court should be affirmed, setting aside petitioner's conviction and sentence, releasing him from parole and its attendant terms and conditions, and relieving him of the remaining portion of his fine.

Dated, San Francisco, California,
April 23, 1969.

Respectfully submitted,
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RESPONDENT'S

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 35

HUGH BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 44–45) is reported at 403 F. 2d 340. The opinion of the district court (A. 26–43) has not been reported.

JURISDICTION

The judgment of the court of appeals (A. 46) was entered on November 5, 1968. The petition for a writ of certiorari was filed on January 13, 1969. Certiorari was granted on February 24, 1969 (393 U.S. 1079). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's 1955 conviction under the False Statement Act for filing a false affidavit with the National Labor Relations Board may be attacked collaterally on the ground that the statute providing for the filing of the affidavit (upheld by this Court less than a year before the filing and since repealed) was unconstitutional.

2. Whether, if petitioner may be heard to raise the claim, the decision in *American Communications Association* v. *Douds*, 339 U.S. 382, which sustained the constitutionality of Section 9(h) of the Taft-Hartley Act against all contentions now repeated, should be overruled.

STATUTES INVOLVED

Petitioner's Brief (pp. 5–8) sets forth, in pertinent part, the False Statement Act, 18 U.S.C. 1001; Section 9(h) of the National Labor Relations Act, as added by the Labor Management Relations Act of 1947 (popularly called the Taft-Hartley Act), 61 Stat. 146; Section 504 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U.S.C. 504; 28 U.S.C. 1651; and 28 U.S.C. 2255.

STATEMENT

1. Petitioner was convicted in 1955 of knowingly and wilfully making a false statement in a matter within the jurisdiction of an agency of the United States government, in violation of 18 U.S.C. 1001. Specifically, it was charged that in 1951 he filed an

affidavit under Section 9(h) of the Taft-Hartley Act[1] fraudulently denying membership in or affiliation with the Communist Party. He was acquitted by the jury on the charge relating to membership but found guilty of having knowingly lied in denying affiliation with the Party. He was sentenced to five years imprisonment and a $10,000 fine. Over a variety of constitutional, procedural, and evidentiary challenges, the court of appeals affirmed, *Bryson* v. *United States,* 238 F. 2d 657, rehearing denied, 243 F. 2d 837 (C.A. 9), certiorari denied, 355 U.S. 817, rehearing denied, 355 U.S. 879. A later application for reduction of sentence was rejected, *Bryson* v. *United States,* 265 F. 2d 9 (C.A. 9), certiorari denied, 360 U.S. 919.[2]

2. The circumstances relating to the offense are these:[3] As early as 1936 or 1937 petitioner was an active and militant member of the Communist Party who accepted Party discipline, and was also a member of the Marine Cooks and Stewards Union. As he rose in leadership positions within the union he also occupied important offices within the Party. He served

[1] In 1959, Section 9 (h) was repealed, and Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504) was enacted, making it a crime for any person who had been a member of the Communist Party within five years to be a union officer.

[2] Various pre-trial proceedings are reported *sub nom. United States* v. *Bryson*, at 16 F.R.D. 450, 453, and 477 (all N.D. Calif.); see also, 223 F. 2d 775 (C.A. 9) (bail pending appeal).

[3] This narrative is taken from the summary of evidence contained in the prior opinions of the court of appeals, *supra*, 238 F. 2d at 659–660, 265 F. 2d at 11, and from the statement contained in the government's brief in opposition to certiorari on direct review, No. 171, O.T. 1957, the accuracy of which petitioner did not contest in his reply brief therein.

on the Executive Board of his Party cell as early as 1941. His participation at county-level Party affairs included indoctrination talks, expulsion of members, and solicitation of new ones. In one of his lectures he was quoted as instructing members: "When you are in the Communist Party you accept discipline. You ask no questions. * * * For the good of the party you carry out any order that is given to you from the top * * * and you ask no questions." In a 1946 meeting, petitioner was introduced as a member of the Party's county (San Francisco) and state (California) committees. In 1947 he became national president of the union.

Also in 1947, congressional concern with the influence of the Communist Party on the labor movement led to the inclusion in the Taft-Hartley Act of the provision, subsequently repealed in 1959, that is challenged in this case. Section 9(h) of the Act provided that the services of the National Labor Relations Board would not be made available to any union whose local and national officers had not filed affidavits disavowing membership in or affiliation with the Communist Party or any other organization advocating the overthrow of the United States government by illegal or unconstitutional means. In the summer of 1947, the Party's Trade Union Director announced at a Party meeting that it would be Party policy to boycott the Act's requirements for the present but that, if Communist-dominated unions were challenged by other unions and resort to the NLRB became necessary, the union officers involved would resign from

the Party in name only but actually remain in close touch and allegiance with the Party. Participating in the discussion at this 1947 meeting, petitioner agreed that he too saw no immediate need to comply with Section 9(h), but that it might be necessary at a later date to do so because of organizing pressure from a rival union.

In May of 1950, this Court sustained the constitutionality of Section 9(h) against challenges that it was a bill of attainder, unduly vague, and a violation of First Amendment freedoms. *American Communications Association* v. *Douds,* 339 U.S. 382. In the Spring of 1951 petitioner's union and a competitor were engaged in certain jurisdictional disputes, and on April 26, 1951, petitioner filed with the Board an affidavit under Section 9(h) averring that he was neither a member of the Party nor affiliated with it. According to trial testimony, however, petitioner had explained, in 1949, that the refusal to seat a delegate to a union convention was premised on the delegate's failure to accept an opportunity to join the Communist Party. Testimony also established that during a union disciplinary proceeding directed against another individual in July of 1951, barely two months after petitioner filed his affidavit, the member complained of the "carryings-on" of the Communists in the union movement, and petitioner responded: "If you are referring to me, I'm still a Communist and proud of it." Two men who went to petitioner's office seeking job assignments in that same month testified that they were told by him that Party membership "might

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help"; in reply to their question whether petitioner was then a member, he proclaimed "Yes, and I'm proud of it".

Petitioner's defense when indicted under 18 U.S.C. 1001 for making a false statement to a government agency consisted essentially of character witnesses attesting to his reputation for veracity and of vigorous cross-examination of the adverse witnesses. He did not testify.[4] Insofar as presently relevant the jury was instructed that petitioner could be found guilty of falsely denying "affiliation" with the Party if he had functioned in a close working alliance with the Party on a fairly permanent basis, with the mutual understanding that the organization could depend on him to cooperate with it and work for its benefit.[5]

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[4] Petitioner's version of the events surrounding the charge, of his consultation with counsel before deciding to submit the affidavit, and of his dissociation from the Party in 1947—repeatedly emphasized throughout his brief before this Court as if they were incontrovertible facts unconscionably ignored by the jury—stems solely from an ex parte affidavit he prepared in December 1957 in support of a motion to reduce his sentence. See Transcript of Record, pp. 5–22, *Bryson* v. *United States*, No. 929, O.T. 1958.

[5] The instructions of the court on affiliation were as follows (238 F. 2d at 664 n. 8):

> The verb "affiliated", as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.
>
> A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and de-

The jury found petitioner guilty on the affiliation count, and he was sentenced to five years imprisonment and a $10,000 fine, with the proviso that he remain subject to imprisonment until the fine was paid.

3. After his conviction had become final and an attempt to secure reduction of sentence was unsuccessful, petitioner served nearly two years of his sentence before he was paroled in December 1959 (A. 5). Only $2,000 of the fine has been paid, however, and in accordance with the terms of the original sentence petitioner has not finally been discharged from his parole status (*ibid.*). In 1965, petitioner commenced the present collateral action in the sentencing court seeking relief from the conviction and sentence.

The district court held that this Court's intervening decision in *United States* v. *Brown*, 381 U.S. 437,

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pend on him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

I tried to think of some analogy which would make that possibly clearer to you, and the best one I can think of—we have all in our experience probably heard of a man and woman who live together but are not married. They are husband and wife in everything but name only. You have probably heard that expression. A person to be affiliated with the Communist Party within the meaning of that term as used in the Second Count of the indictment must be a member in every sense and stand in the relationship of a member in every sense but that of the mere technicality of being a member—in everything but name.

In *Killian* v. *United States*, 368 U.S. 231, 256, this Court specifically approved the adequacy of the instructions given at petitioner's trial.

holding unconstitutional the differently phrased criminal provision enacted in 1959 to replace Section 9(h), compelled the conclusion that *Douds* was no longer good law, that Section 9(h) had been unconstitutional, and that the prosecution for submitting a false statement to the Board was a nullity. The court declined to read the decision in *Dennis* v. *United States*, 384 U.S. 855, as precluding an attack on the underlying statute in avoidance of the consequences of a knowing and wilful filing of a fraudulent affidavit. Petitioner's conviction was ordered set aside and his parole discharged (A. 26–43). On the government's appeal, the court of appeals reversed with a *per curiam* opinion. The court ruled that *Dennis* did apply, leaving petitioner without standing to challenge the validity of the statute whose application he had fraudulently evaded (A. 44–45).

SUMMARY OF ARGUMENT

1. In 1955 petitioner was convicted of violating the False Statement Act by knowingly and wilfully submitting a fraudulent affidavit that falsely denied his affiliation with the Communist Party. Under the circumstances of this case, there is no reason to question the jury's verdict that petitioner understood that the term "affiliation", as narrowly construed, described his continuing association with the Party, an adherence that amounted to full membership in everything except in name. Under settled principles reiterated and applied as recently as *Dennis* v. *United States*, 384 U.S. 855, he may not now be heard to argue that the statute under which he submitted his affidavit

(Section 9(h) of the Taft-Hartley Act), and which he chose to subvert rather than to challenge openly, was actually unconstitutional. Not long before he filed his affidavit, this Court in *American Communications Association* v. *Douds*, 339 U.S. 382, had upheld the constitutionality of the statute against every challenge petitioner now repeats. His deliberate course of deceit, found by the jury, constituted contempt for law, and the consistent line of decisions establishes that a person in such a posture is not an appropriate party to litigate the validity of the statute fraudulently evaded. This principle does not apply only to conspiracies but with equal force governs an individual's attempt to mislead a government agency. Petitioner has no more basis, of course, for obtaining relief collaterally by raising a contention that was not and is not a defense to his prosecution.

This principle is especially pertinent to petitioner's case, since he stands convicted under a general statute prohibiting the knowing and wilful making of false statements to a government agency and no element of that offense turns on the validity *vel non* of Section 9(h) of the Taft-Hartley Act. Section 9(h), which was repealed in 1959, provided that only those unions whose officers had filed affidavits attesting that they were not members or affiliates of the Communist Party could resort to the processes of the National Labor Relations Board. Even if the union of which petitioner was president could have insisted, despite this Court's then recent decision in *Douds*, that Section 9(h) was not a valid condition upon eligibility to invoke Board processes, petitioner had no privilege to render pur-

ported compliance that was in fact, as the jury determined, knowingly deceitful. Although the False Statement Act relates to matters within the "jurisdiction" of an agency, this term has been construed to mean only that the agency must have had "colorable authority" to act upon the information received. Given this Court's decision in *Douds* and the provision conditioning the Board's exercise of any of its functions upon the receipt of the requisite affidavits, petitioner's false affidavit certainly came within the Board's "jurisdiction" in that statutory sense. Congress, of course, has a legitimate interest in preserving the integrity of governmental operations and protecting its agencies from fraudulent misinformation; this statute therefore validly prohibits the deliberate submission of such information irrespective of whether the particular program involved would subsequently be sustained.

Thus, in the classic sense, petitioner lacks standing to ask that the Court now overrule *Douds* and declare this repealed statute to have been unconstitutional. Even if Section 9(h) had been unconstitutional, petitioner would be entitled to no relief from his conviction for violating a distinct anti-fraud statute.

2. If the Court decides that petitioner may be heard to litigate the constitutionality of Section 9(h), the decision in *Douds* should be reaffirmed. His reliance on *United States* v. *Brown,* 381 U.S. 437, to argue that Section 9(h) was a bill of attainder, is misplaced; the Court in *Brown* expressly distinguished *Douds* and Section 9(h) from the criminal provision there at issue. The Court also applied traditional principles that had also guided the disposition of *Douds.* The

crucial inquiry in determining whether legislation may be a forbidden bill of attainder is whether it was intended to impose *punishment* directly on named individuals or a specified class. But the prescription of current qualifications for an occupation or profession is not punishment, and that was the object of Section 9(h)—not to punish Communists as a class for prior misconduct but to insure, by deterring the selection of current Party members or affiliates as union officers, that they would not abuse the power entrusted to unions by federal legislation by directing it toward political chaos rather than economic betterment. And, as the Court recognized in *Douds* and elsewhere, there was more than sufficient support for the congressional determination in 1947 that the Communist Party of the United States was controlled by a foreign government *and* that the nature and impact of Party discipline made it quite likely that any knowing Party member or affiliate who secured union office would misuse his power for illegitimate ends. The statute, now repelled, must be viewed as of the date of its enactment and application. Section 9(h) was constitutionally indistinguishable from any other legislation establishing qualifications by reference to a class that may not include all or only those who would actually be unfit for the position. Just as with disqualifications under conflict-of-interest legislation, for example, the legislative prediction of the probabilities of the situation, if reasonable, cannot be termed "punishment" in the constitutional sense.

Nor did Section 9(h) violate the First Amendment. It was not concerned with speech, with ideas, with

association, or even with the advocacy of forcible overthrow of the government. That section was designed solely to avoid intolerable obstructions to the free flow of commerce that were reasonably deemed likely to result if knowing Communists obtained leadership positions in labor unions. For this reason also, the legislation was not unduly broad; it focused only upon the core of the problem and applied only to knowing union *officers*. Finally, petitioner is in no position to complain that the term "affiliated" in the statute was so vague as to offend due process. At his trial, in instructions which this Court later expressly approved as full and complete, the term was given such a narrow meaning that, as the court of appeals observed in upholding his conviction, petitioner could not honestly assert surprise that the term covered the allegiance the record showed *he* had given to the Party.

Even on the merits of his constitutional contentions, therefore, petitioner would be entitled to no relief.

ARGUMENT

I. PETITIONER MAY NOT ATTACK HIS CONVICTION FOR MAKING A FALSE STATEMENT TO THE GOVERNMENT BY ARGUING THAT THE GOVERNMENT COULD NOT CONSTITUTIONALLY HAVE REQUIRED A STATEMENT TO BE MADE.[6]

Petitioner seeks relief from his conviction on the ground that Section 9(h) of the Taft-Hartley Act

[6] This same issue is before the Court, in a different context, in *United States* v. *Knox*, No. 17, O.T. 1969, probable jurisdiction noted, April 21, 1969, involving a prosecution under 18 U.S.C. 1001 for making false statements in forms submitted under the wagering tax laws.

was unconstitutional. The Court need not, however, reach the question whether the decision in *American Communications Association* v. *Douds,* 339 U.S. 382, upholding the statute—now repealed for ten years—should be overruled. Rather, we submit that petitioner may not be heard to raise this constitutional issue, for two separate but merging reasons. First, a person who has fraudulently purported to comply with a statute may not, when he is found out, be heard to justify his fraud by claiming that the statute was invalid. Reinforcing that principle is the second factor that, in this case, none of the elements of the crime of which petitioner was convicted, the falsification of an affidavit in violation of 18 U.S.C. 1001, depends on the validity of Section 9(h) of the Taft-Hartley Act, under which the affidavit was tendered.

A. PETITIONER IS DISQUALIFIED BY HIS FRAUDULENTLY FEIGNED COMPLIANCE WITH THE STATUTE

Less than a year before petitioner filed the affidavit that the jury found to have been falsified, this Court had accepted for decision two suits challenging the validity of Section 9(h). In one a union sought to restrain the enforcement of Section 9(h), and in the other a different union secured judicial review by challenging the Labor Board's postponement of a remedy in an unfair labor practice proceeding pending the filing of the necessary affidavits. See *American Communications Association* v. *Douds* and *United Steelworkers of America* v. *National Labor Relations Board,* both reported at 339 U.S. 382. In those cases the Court sustained the validity of Section 9(h).

Petitioner elected neither to honor this Court's determination *nor* to seek its overruling by resort to any of the direct judicial avenues available to him individually and as president of his union. Compare *DeVeau* v. *Braisted,* 363 U.S. 144. Instead, as the jury found, he embarked upon an evasive course of purported compliance with the statute, inducing the Board to make its facilities available to his union while he served as an officer, despite his knowledge that his affidavit of nonaffiliation with the Communist Party was untrue. The jury's finding that petitioner falsely swore that he was not affiliated with the Communist Party was, as we have noted (pp. 6–7, *supra*), based upon instructions from the court that narrowly defined that term in language that this Court explicitly approved in *Killian* v. *United States,* 368 U.S. 231. The facts clearly support such a finding, and this long finalized determination precludes any contention on petitioner's part that he was not aware, when he filed the affidavit, that his situation was one of "affiliation" with the Party as so defined. The court of appeals disposed of that point in its consideration of the petition for rehearing before it in 1957 (243 F.2d at 840):

> What is required is that the false statement shall have been made with knowledge that it was in violation of the statute. In this case, Bryson was found to have denied that he was affiliated with the Communist Party at a time when he was a member of the Party in everything but name. We think that a person who is a member in everything but name could not

> honestly and without taint swear that he was not affiliated with the Party. § 9(h), as applied in this case, was not unconstitutionally vague according to that standard.

Thus—whatever the situation might be on some other facts—there is no room for doubt that petitioner's 1951 affidavit was knowingly and wilfully false.

Petitioner's attempt now to purge himself of criminal responsibility for his deceit by collaterally challenging a distinct statute is not unprecedented, but an award of relief would be. In *United States* v. *Kapp,* 302 U.S. 214, for example, the defendants were charged with submitting false claims under the Agricultural Adjustment Act. Despite the prior decision in *United States* v. *Butler,* 297 U.S. 1, that the Act was void as beyond the scope of federal authority under the Constitution, this Court nevertheless upheld a prosecution under the predecessor of 18 U.S.C. 1001. Chief Justice Hughes explained for the unanimous Court (302 U.S. at 218):

> It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government.

This principle applies whether or not the fraud is conspiratorial or individual, and irrespective of whether there is any damage or reliance upon it.

Thus, a unanimous Court in *Kay* v. *United States*, 303 U.S. 1, 5–6, observed:

> It does not lie with one knowingly making false statements with intent to mislead the officials of the [Home Owners' Loan] Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. * * * The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

Although there was no allegation of conspiracy, such as petitioner repeatedly insists in his brief is necessary for this principle to be applicable (*e.g.*, pp. 79-80), the Court also refused to allow the defendant to argue that "the whole scheme of the statute is invalid":

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.
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> * * * While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same. Apart

> from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered * * * [303 U.S. at 6–7].[7]

This rule is founded in part on the sound policy that "no man can be judge in his own case * * *." *Walker* v. *City of Birmingham,* 388 U.S. 307, 320. Whatever the propriety and permissibility of openly declining to obey a statute in order to test its validity, see *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147, a person may not fraudulently feign compliance, hoping to avoid detection, while keeping in reserve his opinion that the statute was void. Compare *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 179. The citizen may either comply honestly, or frankly disobey, but he may not fashion his own clandestine remedy by extending fraudulent cooperation. A familiar analogue arises under the Fifth Amendment privilege against self-incrimination: A defendant in a criminal trial may indisputably decline to testify at all, but once he has elected not to rely on his privilege he must testify truthfully. See *Harrison* v. *United States,* 392 U.S. 219, 222. If his ostensible participation in the pro-

[7] Since the criminal provision under which the indictment was drawn in *Kay* was part of the challenged act itself, the Court went on to note that the separability clause in the statute sufficed to sustain the independent vitality of the criminal prohibition. In the present case, of course, no separability clause is required since the only criminal sanctions available rest on distinct, general statutes like 18 U.S.C. 1001. See *Leedom* v. *International Union of Mine Workers,* 352 U.S. 145, 148.

ceedings was in fact a charade, he will not be heard to resist a prosecution for perjury by claiming that the proceedings which he sought to frustrate by his deceit were constitutionally unauthorized. As this Court has said in *United States* v. *Williams*, 341 U.S. 58, 68–69,

> Though the trial court or an appellate court may conclude that the statute [under which the proceedings were brought] is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

For these reasons, the courts have applied the rule that whenever an inquiry is within the "colorable authority" of a government agency, wilful deception practiced in connection with what the agency was actually doing cannot be excused by a claim that the governmental operations involved *could* have been subject to constitutional attack. See, *e.g.*, *United States* v. *Meyer*, 140 F. 2d 652, 655 (C.A. 2); *Humble Oil & Refining Co.* v. *United States*, 198 F. 2d 753, 756 (C.A. 10); *Ogden* v. *United States*, 303 F. 2d 724, 731, affirmed after remand, 323 F. 2d 818 (C.A. 9), certiorari denied, 376 U.S. 973. In this case, of course, the Labor Board's authority to expect and receive non-Communist affidavits from union officers was "colorable" at the very least, since the constitutionality of this prerequisite to Board action had been affirmed by this Court barely eleven months before petitioner, in order to secure the Board's services for the union he led, submitted his false affidavit.

The continuing vitality of these principles is underscored by their recent application in a case which the court below correctly found indistinguishable from the one at bar: *Dennis* v. *United States,* 384 U.S. 855. In *Dennis,* as here, the proof showed that, in conformity with express Communist Party policy, the petitioners maintained their intimate working allegiance to the Party while at the same time officially disavowing such loyalties in affidavits filed under Section 9(h). In each case the jury found "an effort to circumvent the law and not to challenge it—a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction" (384 U.S. at 865). The defendants in *Dennis* were not permitted to assert the "unlawfulness" of "a governmental function * * * required by statute and carr[ying] the fresh imprimatur of this Court", not because the function was immune to judicial challenge but because it could not be circumvented by a course of fraud and falsehood while they withheld their constitutional contentions for use only if and when their deception was discovered. *Id.* at 867. The Court noted that some of the fraudulent acts postdated the decision in *Douds:* "It was flouted, not overlooked" (*ibid.*). So too in this case, petitioner's election to attempt to evade the limitations on the availability of the Board's services by filing a false affidavit followed only months after the validity of Section 9(h) had been sustained in that case. In *Dennis* the Court found no decisive significance in the fact, relied on again by petitioner here, that the constitutional attack focused on the permissibility of the Board's

putting the very question that was answered falsely (384 U.S. at 855):

> We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional.

Although the petitioners in *Dennis* were convicted, not under the False Statement Act, as was petitioner here, but for a "conspiracy, cynical and fraudulent" (384 U.S. at 865), there is nothing in that circumstance that makes the principles the Court followed any the less applicable here. The Court remarked that the petitioners there could "presumably" have been indicted under the False Statement Act (384 U.S. at 860), and the very first authority discussed as establishing the "teaching of the cases" (384 U.S. at 866) was *Kay* v. *United States,* which as we have seen *supra,* pp. 16–17, involved an individual prosecution for a false statement, not a conspiracy.

There is plainly no substance to petitioner's attempt to distinguish himself from the defendants in *Dennis* by now impeaching the jury's verdict—long since upheld on appeal—that he in fact did knowingly and wilfully deny his Party affiliation. Much of the "evidence" of innocence on which petitioner now relies has no foundation other than an *ex parte* affidavit he submitted years after the trial, in support of a mo-

tion for reduction in sentence. Clearly those *post hoc* protests cannot serve to vitiate the jury's findings, supported by the overwhelming testimony before it (see pp. 3–7, *supra*).[8] His contention that he was punished solely for having mistakenly predicted the content the courts were later to give the term "affiliation" is without foundation.[9] On the contrary, the relevant instructions (quoted *supra*, pp. 6–7, n. 5) gave the term its natural meaning, carefully qualified by additional limitations that rendered it even narrower in its scope than one might have anticipated.

Petitioner's contention (Br. pp. 71–78) that he is somehow empowered on collateral review to avail himself of a "defense" that he could not have raised at his

[8] On his 1956 appeal, the Ninth Circuit reviewed the evidence showing his Communist Party membership as of 1947 and outlined the evidence of his continued affiliation with the Party up to the time he submitted the affidavit, and beyond. Placing the overt acts in perspective was the testimony that the Party had formulated a policy of having its members switch to a more clandestine relationship if the filing of a Taft-Hartley affidavit appeared necessary. The court found the evidence sufficient in every respect to support the jury's verdict. 238 F. 2d 657. On rehearing in 1957, the court reaffirmed the sufficiency of the evidence that petitioner had at all relevant times been affiliated with the Party and had knowingly falsified this allegiance in his affidavit. 243 F. 2d 837.

[9] Petitioner's claim that he acted on advice of counsel in signing the affidavit is a belated one that was not made at trial. Whether this allegation is true or not, it would not, as petitioner himself concedes, (Br., p. 9, n. 8), amount to a recognized defense. *Sinclair* v. *United States*, 279 U.S. 263, 299; *Braden* v. *United States*, 365 U.S. 431. Of course, any advice by petitioner's attorney would necessarily have been premised on whatever disclosures petitioner made to the attorney.

trial is plainly insubstantial. Of course the federal courts have jurisdiction to consider constitutional claims of persons convicted of fraud or perjury on collateral review. But where, as here, the goal of collateral review is to establish a substantive defense to the conviction, it is plain that the defendant cannot be heard to make an argument that he could not advance at his trial or on direct review. The collateral review statutes do not give the courts license to decide questions that are irrelevant to the conviction under review. And as the court stated in *Dennis, supra,* 384 U.S. at 866: "It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded in somehow defective."

B. NONE OF THE ELEMENTS OF PETITIONER'S CONVICTION TURNS ON THE VALIDITY OF SECTION 9(h) OF THE TAFT-HARTLEY ACT

There is a conceptually distinguishable but closely related reason why petitioner's case does not involve the constitutionality of Section 9(h): The validity of the statute under which an affidavit is filed with a government agency is legally irrelevant to a prosecution under 18 U.S.C. 1001 for falsifying a statement that is in fact filed. Many of the cases we have discussed allude to this factor, which amounts to a lack of standing in the strict sense, without explaining where its dimensions end and independent policies of estoppel and equity begin.

Petitioner emphasizes the term "jurisdiction" in the False Statement Act, arguing that, if Section 9(h) was unconstitutional, the false affidavit was not within the "jurisdiction" of the Board and the falsification

was not covered by the statute, but this contention does not withstand analysis.[10]

The False Statement Act makes it a crime for any person knowingly and wilfully to make "any false, fictitious or fraudulent statements" in any matter "within the jurisdiction of any department or agency of the United States." As we have seen above (p. 18) this prohibition has been uniformly construed as forbidding the submission of false statements in connection with any function of a government agency colorably within its purview. Indeed, in *Ogden* v. *United States, supra,* 303 F. 2d 724, erroneously relied on by the district court as supporting a contrary view, the court of appeals concluded, after

[10] Resolution of petitioner's constitutional claims in the context of this collateral attack involves additional imponderables that need not be reached if we are correct that he cannot be heard to raise these claims or that in any event Section 9(h) was constitutional. In May of 1950, this Court sustained the constitutionality of Section 9(h) against all objections petitioner here repeats. He filed his false affidavit in April 1951. His trial was held in 1955 and the conviction became final in 1957 with the denial of certiorari and rehearing. In 1959, Section 9(h) was repealed in favor of a different type of provision. Was Section 9(h) unconstitutional from the time it was enacted in 1947, notwithstanding this Court's decision in *Douds*? If not, was petitioner not fairly convicted of evading a valid statute? Why should he be allowed collaterally to seek a new constitutional appraisal of a statute that no longer exists? If Section 9(h) became unconstitutional after his conviction, when did the decisive change occur? The decision in *United States* v. *Brown*, 381 U.S. 437, on which petitioner principally relies, was rendered in 1965, six years after Section 9(h) passed out of existence. So, also, almost all of the other decisions on which petitioner bottoms his request for the overruling of *Douds* postdate the repeal of the statute here being challenged. Is this an appropriate occasion for such an exercise of judicial power?

reviewing the case law, that the "term 'jurisdiction' is not used in the Act in a technical sense"; rather, the court explained, it refers generally to matters on which the agency had power to act. 303 F. 2d at 743.[11] And the Second Circuit has recently agreed, in light of the fact that Section 1001 was "broadly drawn", that the "word 'jurisdiction' as used in the statute must mean simply the power to act upon information when it is received." *United States* v. *Adler,* 380 F. 2d 917, 922, certiorari denied, 389 U.S. 1006.

In this sense, of course, petitioner's affidavit involved a matter within the "jurisdiction" of the Labor Board even if Section 9(h) be assumed to have been unconstitutional. Indisputably, especially in light of *Douds,* in 1951 the Board's "power to act on union charges [was] conditioned on the filing of the necessary affidavits." *Leedom* v. *International Union of Mine Workers,* 352 U.S. 145, 148–149. It is this type of de facto "jurisdiction" that Congress has endeavored to shield from misleading and fraudulent statements. Irrespective of how the constitutionality of Section 9(h) would be resolved at this juncture, false affidavits filed while it was in force, like the one petitioner submitted, fell within the ambit of the False Statement Act. The Board certainly had apparent authority to act upon the filing of the affidavits and did make its processes available (as the statute

[11] The court in *Ogden* had held earlier in the opinion that a person cannot resist a false-statement prosecution by challenging the constitutionality of "inquiries regarding a matter colorably within the authority of a government agency * * *" (303 F. 2d at 731).

required) only when such affidavits had been filed. See *United States* v. *Killian,* 246 F. 2d 77, 80 (C.A. 7); *Hupman* v. *United States,* 219 F. 2d 243, 247–248 (C.A. 6), certiorari denied, 349 U.S. 953. It is scarcely debatable, moreover, that Congress has a valid legislative interest in protecting the integrity of official activities *at least* until they are judicially determined to be unconstitutional.[12] Hence petitioner's conviction under 18 U.S.C. 1001 would not fall even if Section 9(h) were retroactively determined to have been unconstitutional. Cf. *United States* v. *Williams, supra,* 341 U.S. at 66 (perjury statute): "Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction."

In *Dennis, supra,* this Court at the very least implicitly held that a prosecution like the present one does not turn upon the validity of the affidavit section of the Taft-Hartley Act, because no element of the crime depended upon whether that section was independently enforceable. The Court expressly commented that the defendants who had actually filed false affidavits under Section 9(h) "presumably could have been indicted for the substantive offense of making false statements as to a 'matter within the jurisdiction of' the Board, a violation of 18 U.S.C. § 1001 (1964 ed.)." 384 U.S. at 860. In holding that the indictment properly charged a conspiracy to defraud the government by obstructing a "lawful function", the Court explained that (*id.* at 862):

[12] Compare *United States* v. *Kapp, supra,* where this Court sustained a false-statement prosecution *after* it had held unconstitutional the statute under which the statements were made.

> Congress unmistakably regarded the filing of truthful affidavits—and not merely affidavits true or false—as of the essence of the privilege of using Board facilities. Congress made this doubly clear by expressly providing that certain criminal statutes, such as 18 U.S.C. § 1001 relating to the filing of false statements, shall be applicable in respect of § 9(h) affidavits.

The district court, in granting petitioner's motion, relied on *United States* v. *Gilliland,* 312 U.S. 86, for the proposition that only "authorized functions" of the government are protected by Section 1001. But that decision does not support an argument that there is no duty of truthfulness in responding to a governmental inquiry that is unconstitutionally authorized by statute. The Court in *Gilliland* did not define the phrase "authorized functions" and said nothing that would support the restrictive definition of jurisdiction for which petitioner contends. On the contrary, the Court there was concerned with explaining that the statute should not be given a *narrow* construction that would frustrate the manifest congressional purpose of protecting the agencies of government "from the perversions which might result from the deceptive practices described". 312 U.S. at 93. For that reason the Court held that the reach of the statute was not to be confined to cases in which there had been pecuniary loss to the government. And in *United States* v. *Bramblett,* 348 U.S. 503, 509, the Court again insisted that the history and purpose of this statute demand an "unrestricted interpretation".

Here, therefore, as in *Dennis,* petitioner's attack on the underlying statute is disqualified not only by the policy that refuses to countenance fraudulent evasion of the law. Here also, as in *Dennis,* petitioner lacks standing in the classic and fundamental sense to invoke his status as a defendant in a prosecution for violation of the False Statement Act as the basis for an attack on Section 9(h): there is decisively absent any nexus between his status and his contention.[13] This case too involves "a prosecution directed at petitioner's fraud. It is not an action to enforce that statute claimed to be unconstitutional." Accordingly, "the claimed invalidity of § 9(h) would be no defense to the crime * * * charged in this indictment" and it therefore continues to be "unnecessary to reconsider *Douds.*" 384 U.S. at 867.

II. SECTION 9(h) OF THE TAFT-HARTLEY ACT WAS CONSTITUTIONAL

If the Court disagrees with our contention that the petitioner is precluded from challenging the constitutionality of Section 9(h) of the Taft-Hartley Act, the holding in *American Communications Association* v. *Douds, supra,* should be reaffirmed. All of the contentions petitioner advances were fully considered in *Douds* and rejected. Intervening developments in constitutional theory do not warrant the conclusion either

[13] See *Flast* v. *Cohen,* 392 U.S. 83, 102; *Jenkins* v. *McKeithen,* No. 548, O.T. 1968, decided June 9, 1969 (plurality opinion p. 10).

that *Douds* was not correctly decided in 1950 or that its principles should now be repudiated as no longer viable.

A. SECTION 9(h) WAS NOT A BILL OF ATTAINDER

The basic thrust of petitioner's attack on Section 9(h) focuses on the bill-of-attainder clause of Article I of the Constitution and draws most of its force from this Court's decision in *United States* v. *Brown,* 381 U.S. 437. That case involved a provision of Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 which provided that any person who served as an official of a labor union within five years after membership in the Communist Party would be subject to one year's imprisonment and a $10,000 fine. 73 Stat. 536, 29 U.S.C. 504 (a)(1), (b). That provision, the Court held, transgressed the prohibition against bills of attainder.

Petitioner argues that the invalidity of Section 9(h) follows necessarily from *Brown* because that section was replaced by the 1959 statute involved in *Brown.* This argument ignores the Court's express caveat in its opinion that Section 9(h) was distinguishable and that *Douds* was therefore not controlling. See 381 U.S. at 457. There is, of course, a mutuality of distinction, and the decision in *Brown* need not be regarded as controlling any reappraisal of *Douds* to the extent of compelling its overruling in the present case. On the contrary, *Brown* recognized the general principles that had long been settled and that had indeed been featured in *Douds;* because of the distinctions between the two statutes it would

not be necessary to find that those principles had not been applied properly in *Brown* (see 381 U.S. at 462–478, dissenting opinion) in order to reaffirm the *Douds* decision.

Section 504(a)(1) imposed a direct criminal prohibition that not only excluded Communists from serving in any labor union but also extended its criminal ban to apply for five years *after* Party membership terminated. As the Court explained, the provision unequivocally and unconditionally directed that anyone who had been a Communist within five years "cannot hold union office without incurring criminal liability" (381 U.S. at 450). In contrast, Section 9(h) imposed no such categorical and unqualified criminal disqualification. It was directly concerned only with regulating the occasions on which the National Labor Relations Board could make its processes available to unions. It did not directly disqualify Communists from serving as union officers, since—as petitioner's own experience illustrates—a member of the Communist Party could serve as a union officer indefinitely without violating any criminal (or civil) statute. Indeed, petitioner continued to serve as president of his union for four years after Section 9(h) became effective before he committed the offense for which he was convicted—seeking to bring his union within the class eligible to resort to the Labor Board by filing a non-Communist affidavit that was in fact fraudulent. He was not "attainted" by Congress and subjected to punishment decreed by the legislature without judicial trial. He elected to render purported compliance with a provision establishing a pre-

condition to his union's right to assert administrative remedies, and he was punished only for violating an independent, general statute that proscribes the knowing and wilful making of false statements to government agencies.

The essence of a bill of attainder, as *Brown* recognized (381 U.S. at 447), is that *punishment* is directly imposed by the legislature upon specified individuals or groups without judicial trial. The Court concluded that Section 504(a)(1) fell within this forbidden category since it imposed a criminal ban on all people who at any time within a five year period *preceding* accession to union office had been Communists. Thus, it was held, the statute was *punishing* people in part because of past associations without any individual judicial determination that a particular person had engaged in suppressable activities. Section 9(h), in contrast, imposed no such punishment. 381 U.S. at 458.

In *Cummings* v. *Missouri,* 4 Wall. 277, it was early settled that a bill of attainder is legislatively inflicted punishment. That case involved a provision of the Missouri constitution making it a crime for a person to function as a clergyman (*inter alia*) unless he had first taken an oath that he had not supported or sympathized with the Confederacy. The Court found that this provision was not rationally related to the prescription of qualifications for the profession involved, since such sympathies would in no way suggest that a man was not qualified to be a priest. Yet the state clause conclusively presumed in the absence

of the oath that the individual had been a Confederate sympathizer; the automatic disqualification from exercising his ministry could thus only be viewed as direct punishment inflicted on account of presumed prior sentiments. The Court therefore concluded that the state provisions "assume the guilt and adjudge the punishment conditionally." 4 Wall. at 325. In a companion case, *Ex parte Garland,* 4 Wall. 333, the Court invalidated a federal statute and rule of court that a lawyer could not continue to practice before federal courts unless he swore to an oath that he had not exercised an office under the Confederacy. The Court held that a former Confederate legislator, who had received a full pardon from the President, was entitled to continue his profession, explaining that exclusion from his profession for his *past* conduct would constitute *punishment* in violation of both the attainder and *ex post facto* clauses.

But it was soon made clear that not every disqualification, disability, or restriction could be considered "punishment" in this crucial sense, and thus arguably an attainder. Thus, in *Hawker* v. *New York,* 170 U.S. 189, a state statute forbidding felons to practice medicine was upheld as imposing a reasonable professional qualification, not punishment. The determination that punishment was involved was at the heart of the decision in *United States* v. *Lovett,* 328 U.S. 303, where Congress declared that certain named individuals could no longer work for the government and be paid. Analysis of the legislative history surrounding adoption of that measure demonstrated that the principal motivation for the disqualification was to penalize

the individuals specified for prior "subversive activities" which Congress, not any tribunal, found they had engaged in. See 328 U.S. at 310.

Lovett has not been read to prevent Congress from legislating about classes of persons who may reasonably be thought to warrant disqualification from a particular occupation. In *Garner* v. *Board of Public Works,* 341 U.S. 716, 722–723, the Court distinguished *Lovett* as applying to punishment for past "misconduct" but as not covering "general and prospectively operative standards of qualification and eligibility for public employment." On that basis the requirement of a non-Communist oath was sustained against a challenge that it constituted a bill of attainder.

The plurality opinion by Chief Justice Warren in *Trop* v. *Dulles,* 356 U.S. 86, 95–96, makes clear the distinctions that must be drawn:

> Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. [Footnotes omitted.]

In accordance with that rationale this Court in *De Veau* v. *Braisted,* 363 U.S. 144, 160 (plurality opinion), sustained against a bill-of-attainder challenge a statute rendering felons as a class disqualified to hold office in waterfront labor unions:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.

On these grounds, the broader proscription in Section 504(a) of the 1959 Labor-Management Reporting and Disclosure Act against the holding of office in any union by a person convicted of certain offenses has been held a reasonable regulation of union affairs, not a penal attainder. *Postma* v. *International Brotherhood of Teamsters,* 357 F. 2d 609 (C.A. 2).

The decision in *Brown* did not purport to overturn these settled principles that Congress may lawfully erect qualifications for engaging in certain activities by focusing on a class whose members may generally and ordinarily—even though not necessarily—be viewed as possessing characteristics which would be inimical to that occupation or activity. See, *e.g., Green* v. *Board of Elections,* 380 F. 2d 445, 449–450 (C.A. 2), certiorari denied, 389 U.S. 1048 (person convicted under Smith Act is validly covered by statute denying felons the right to vote); *Fitzgerald* v. *Catherwood,* 388 F. 2d 400, 407 (C.A. 2), certiorari denied, 391

U.S. 934 (state law permissibly makes criminal a union officer's holding of financial interest in company whose employees his union represents).

Section 9(h) of the Taft-Hartley Act was properly found by the Court in *Douds* to pass constitutional muster under these principles. The Court found, after an examination of legislative and historical material that need not be repeated, that Congress was in no sense trying to impose legislative punishment on all Communists for past deeds (339 U.S. at 413–414). Rather, recognizing that the economic power possessed by labor unions flowed primarily from federal legislation administered by the National Labor Relations Board, Congress was acting to insure that this power not be abused for political ends adverse to national peace and economic well-being. 339 U.S. at 401–402. The manifest object of the provision was to avoid the danger that when persons *currently* adhering to the Communist Party's militant principles and discipline reached positions of union dominance they might frustrate the essential object of the federal labor laws, the elimination of obstructions to the free flow of commerce. 339 U.S. at 387, 396.

As the Court explained in *Douds,* the remedy chosen was not meaningfully distinguishable from imposing a qualification for the occupation of union officer. Just as Congress now bans certain felons from holding union office, not because all felons or only felons are likely to engage in corrupt practices, so also Congress permissibly concluded, on the basis of the investigations it had conducted into the effect of Party discipline and dogma on the conduct of Communist adher-

ents, that the average Communist was sufficiently likely to seek to abuse union office for political goals that a broad disqualification would be appropriate. "Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected." *Flemming* v. *Nestor,* 363 U.S. 603, 614. As the Court found in *Douds,* Section 9(h) was not concerned with penalizing Communists but with regulating and protecting the legitimate labor movement. See 339 U.S. at 387, 403–404. Thus, this Court quite properly analogized the legislation to the conflict-of-interest statute involved in *Board of Governors* v. *Agnew,* 329 U.S. 441, where the natural probabilities of divided loyalty were regarded as sufficient to sustain a generalized class-disqualification not turning upon actual misconduct by any particular individual.[14]

In *Brown,* the Court agreed that Congress may validly express the "characteristics it was trying to reach in an alternative shorthand way" (381 U.S. at 454) by designating a class that possesses those characteristics; Section 504(a)(1), however, was found not to be a shorthand formula for identifying people likely to foment prohibitable political strikes (381 U.S. at 456). It is clear, however, that a class-disqualification need not be precisely conterminous with the identity of the individuals who would actually engage in illegal activities. The legislative judgment must necessarily, and therefore may properly, take

[14] See, also, for example, 28 U.S.C. 458.

into account the probabilities of the situation; a reasonable approximation is all that is constitutionally required. See, *e.g.*, *Hawker* v. *New York*, *supra*; *De-Veau* v. *Braisted*, *supra*; *cf Board of Governors* v. *Agnew*, *supra*. Illustrations of this proposition are legion: statutes rendering persons under eighteen years of age ineligible to operate automobiles, barring felons from engaging in certain professions, preventing relatives of civil servants from serving in the same agency, or precluding alcoholics from owning firearms, all circumscribe individuals who might never drive irresponsibly, cheat their clients, relax on the job or pyramid influence, or commit a violent assault while intoxicated. On the other hand, statutes like these do not reach *all* the persons who might engage in such conduct. Yet, we believe, no one could seriously contend that legislative use of such classifications would offend the bill-of-attainder clause.

This principle, of course, may be invoked only when there is a reasonable relationship between the class specified and the danger to be avoided; otherwise the rational inference would be that the disability is imposed as punishment. See *Cummings* v. *Missouri*, *supra*. Petitioner asserts that the legislative classification employed by Congress in Section 9(h) manifests no such nexus with a perceptible evil, relying on his analysis of intervening developments on the international scene (occurring after the repeal of the statute in question). This approach is beside the point, however, for the purpose and rationality of the classification made in Section 9(h) must be assessed in

light of the context of 1947, when it was enacted. Only in this way can there be a meaningful inquiry whether it was designed to "punish" Communists, in violation of the attainder clause. It is unnecessary to repeat here the evidence relied upon in *Douds* (339 U.S. at 387–389) that led Justice Jackson to explain in his separate opinion that the Communist Party is constitutionally *sui generis* (339 U.S. at 422–423):

> From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and use methods which are incompatible with our constitutional system. [339 U.S. at 424.]

Justice Jackson accurately summarized the data illuminating the nature of the Communist Party and the relationship of its members to it (surveyed at 339 U.S. at 424–433), as follows:

> There is certainly sufficient evidence that all members owe allegiance to every detail of the Communist Party program and have assumed a duty actively to help execute it, so that Congress could, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the Party. [339 U.S. at 433.]

As a consequence, Congress was lawfully entitled to adopt a regulatory remedy appropriately tailored to the scope of the problem: discouragement of union members from selection of Communists to serve as union officers if they wished to have their union eligi-

ble to use the facilities of the National Labor Relations Board.

We close this discussion of the attainder clause by noting that the legislative findings accepted by the Court in *Douds* were subsequently confirmed after lengthy evidentiary hearings before an administrative agency, focusing on the period that included both the passage of Section 9(h) and the filing of petitioner's false affidavit. On judicial review, this Court found the administrative findings amply supported. *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U.S. 1, 35–56. The Court held that the Party had no basis for attacking the findings that "its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of the Soviet Union" and "consider the allegiance they owe to the United States as subordinate to their obligations to the Soviet Union * * *." 367 U.S. at 57. See, also, *United States* v. *Brown, supra,* 381 U.S. at 470–471 (White, J., dissenting).

In this context, petitioner can hardly be heard to say that the congressional attempt to keep him from control over a union constituted an impermissible attempt to "punish" him, rather than the establishment of a reasonable qualification for responsible union leadership. Whatever may have been the effect of Section 9(h) on others, petitioner's high position within the Communist Party and his express acknowledgement of the binding force of Party discipline (see pp. 3–4, *supra*), interact to demonstrate the permissibility of the congressional course.

B. SECTION 9(h) DID NOT VIOLATE EITHER THE FIRST AMENDMENT OR THE FIFTH AMENDMENT

Much of the foregoing discussion is relevant in demonstrating the unsoundness of petitioner's allegations that Section 9(h) violated First Amendment freedoms or Fifth Amendment due process.

Section 9(h) did not unwarrantedly intrude upon the First Amendment right of free speech or the right to hold political beliefs. As the Court said in *Douds,* Congress was not attempting to suppress either speech or thought by enacting Section 9(h) of the Taft-Hartley Act:

> Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. * * * [P]olitical strikes * * * are called by persons who, so Congress has found, have the will and power to do so *without* advocacy or persuasion that seeks acceptance in the competition of the market. [339 U.S. at 396; emphasis in original.]

So it was that in *Speiser* v. *Randall,* 357 U.S. 513, 527, the Court explained that Section 9(h) as con-

strued in *Douds* did not offend First Amendment principles because

> there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. * * * [The] case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim * * * was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.[15]

The viability and the applicability of this principle remain undiminished by the subsequent decisions on which petitioner relies. As most recently summarized in *Brandenburg* v. *Ohio,* No. 492, O.T. 1968, decided June 9, 1969, slip op. p. 4, all of those cases [16] stand for and apply the proposition that government may not proscribe or punish the advocacy of the use of force

> except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. * * * A statute which fails to draw this distinction impermissibly intrudes upon the free-

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[15] See, also, *Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. at 56.

[16] *E.g., United States* v. *Robel,* 389 U.S. 258; *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Elfbrandt* v. *Russell,* 384 U.S. 11; *Aptheker* v. *Secretary of State,* 378 U.S. 500; *Baggett* v. *Bullitt,* 377 U.S. 360.

> doms guaranteed by the First * * * Amendment * * *. It sweeps within its condemnation speech which our Constitution has immunized from government control.

Section 9(h), however, as we have seen, was not concerned with speech or advocacy but with the qualifications for union office and the likelihood of its abuse.

Nor was that section overbroad, and thus violative of the First and Fifth Amendments. In *Aptheker* v. *United States,* 378 U.S. 500, for example, the Court held unduly sweeping a provision that denied passports to all Communists—and thus constricted their constitutional right to travel—irrespective of their individual knowledge, commitment, objectives, and activities. Section 9(h), which did not deal directly with any constitutional right but only with service as an officer of a union eligible to resort to the Labor Board, touched "only a relative handful of persons"—Communists who also wished to be union *officers*—"leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." *Douds, supra,* 339 U.S. at 404. This precise focus dealt specifically with the sub-class that detailed investigation had shown to be the core of the problem that Congress had an undeniable interest in resolving. And, there was no danger that the unknowing would be swept up in the disqualification; as the Court held in *Leedom* v. *International Union of Mine Workers,* 352 U.S. 145, 148–149, the Labor Board had no power to inquire into the accuracy of the affidavit filed or to deny its services to any union whose officers had in fact filed the requisite affidavits. The only possible sanction provided

by Congress, as applied in the present case, was the criminal prosecution of a person who had *knowingly* and *wilfully* submitted a false denial of his membership or affiliation.[17]

In *United States* v. *Robel,* 389 U.S. 258, 267, the court placed its holding in perspective by making a pertinent observation:

> We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. * * * Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials.

Section 9(h) represented a narrowly drawn congressional response to the particular problems that Communist union *officers* might be expected to cause in disrupting the free flow of commerce. In light of the practical difficulties and probable inadequacy of alternative approaches, the Court in *Douds* found Section 9(h) sufficiently precise in its focus. 339 U.S. at 406. That judgment has not been undermined by anything the Court has said or done in the interim.

Petitioner's remaining contention—that Section

[17] The affidavit procedure, which in substance sought to ascertain whether the individual was disqualified from holding office in a union that wished to use Labor Board procedures, violated no constitutional rights by formally inquiring into the individual's *current* Communist Party membership or affiliation. Compare *Wilkinson* v. *United States*, 365 U.S. 399, 413–415, and *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 52, with *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829.

9(h), insofar as it was applied in his case, was impermissibly vague, in violation of due process—can be rejected with the briefest discussion. We have already mentioned that the instructions given at petitioner's trial (see note 5, *supra*, pp. 6–7) received this Court's explicit approval in *Killian* v. *United States*, 368 U.S. 231, 256, as "full and complete" and adequately informing the jury of the meaning of the term "affiliated with". And, as we have shown, the facts of petitioner's case were such that he can scarcely claim that he could not reasonably have understood the meaning of the term when he filed his affidavit (see pp. 14–15, *supra*).

CONCLUSION

Petitioner should not be heard to impugn the constitutionality of Section 9(h) of the Taft-Hartley Act (now repealed). If, however, the Court determines that this case calls for a re-examination of the decision in *American Communications Association* v. *Douds*, that decision should be reaffirmed. In either event, the judgment denying relief should be affirmed.

Respectfully submitted.

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